Supreme Court, U.S.
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95-841 NOV 29 1995

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NO. _____

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1995

ALBERT AKINS, ET AL.,
PETITIONERS

v.

ZENECA, INC.,; RHONE-POULENC, INC.; RHONE-POULENC BASIC CHEMICALS COMPANY; STAUFFER CHEMICAL COMPANY; INTERNATIONAL UNION OF OPERATING ENGINEERS, AFL-CIO; LOCAL 912 INTERNATIONAL UNION OF OPERATING ENGINEERS, AFL-CIO,
RESPONDENTS

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

VOLUME I

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Whether a Union may represent separate bargaining units with conflicting interests and discriminate in favor of one unit.

2. Whether Petitioners who fully performed their part of the bargain may be denied performance promised in the contract where both plants signed the contract and both employer Respondents who purchased the separate plants assumed the obligations to Petitioners.

3. May Petitioners' contract rights be surrendered by third parties (ICI bargaining unit) where neither Petitioners nor their bargaining unit ever approved or authorized such a surrender?

4. Is there a contract violation where the Union Constitution provides:

a. that any contract affecting rights of members must be submitted to the members affected for approval [Article XXIV(11)(e)] and the Union refuses to submit such a contract to the affected members for approval;

b. that the International Union shall enforce the Constitution [Article VI(5) and (3)] and it refuses to enforce provisions of the Union Constitution requiring the submission of a contract affecting the rights of members to such members for approval;

c. that the International Union is authorized to interpret the Constitution [Article VI(2)] but when

requested, refuses to interpret a clear provision of the Constitution requiring submission of a contract affecting members' rights to the affected members for approval;

d. that the International Union has power to compel the faithful performance by the Local Union of its duty of fair representation [Article VI(3) and (5)] but it refuses to take any action when it has knowledge (1) that the Local Union plans to discontinue a grievance on behalf of Petitioners because of its duty of fair representation to other members in another bargaining unit and (2) that the Local Union is acting adversely to Petitioners, favoring the ICI bargaining unit over Petitioners' unit?

5. Whether Respondents have conspired to injure Petitioners where:

a. the Union, for approximately one year, falsely advises Petitioners that their rights cannot be affected by actions of the other bargaining unit when the Union knows Petitioners' rights will be affected;

b. an employer exploits the conflict of interest situation and demands that the Union favor the other bargaining unit;

c. layoffs are postponed just long enough to permit the other bargaining unit to execute a contract affecting Petitioners' rights;

d. the Union refuses to process a grievance on behalf of Petitioners because of the Union's duty of fair representation to the other bargaining unit;

e. the Union refuses to advise whether a contract with another bargaining unit, which will affect Petitioners' rights, must be submitted to Petitioners or their bargaining unit for approval;

f. the Union files a sham declaratory judgment action as a "friendly lawsuit" between Respondents and for nearly eight months no Respondent files a motion for summary judgment or dismissal;

g. the Union immediately after the new contract with the other bargaining unit is approved, notifies Petitioners their rights have been destroyed and the Respondents stipulate a dismissal of the sham declaratory judgment action; and

h. the corporate Respondents are not parties to the contract of the Union Constitution.

6. Is the International Union liable for its own acts and the acts of the Local Union where:

a. it is a party and principal to the Constitutional contract rather than an agent;

b. the International Union, under the Constitution, has full control of the Local Union;

c. the International Union participates in all negotiations from 1982 through 1990;

d. the International Union refrains from any overt participation in the 1991 negotiations when it was aware Petitioners' rights were being destroyed; and

e. the International Union has prior knowledge and ratifies the actions of the Local Union.

7. Did the Court of Appeals usurp the function of the jury and ignore the standards for a Rule 56 summary judgment or a Rule 50 judgment as a matter of law by:

a. ignoring the findings of the District Court supported by voluminous evidence that the Union had failed to process a grievance on behalf of Petitioners because of the duty of fair representation it had to the other bargaining unit;

b. ignoring the findings of the District Court supported by voluminous evidence that there had been a "complete sell out" by the Local Union of Petitioners and their bargaining unit;

c. ignoring affidavits and other uncontroverted documentary evidence, including reasonable inferences therefrom, showing the employer's liability and the Unions' breach of its duty of fair representation; and

d. construing a severance pay agreement, which included a provision intended to except Petitioners' contract rights to transfer to the other plant from any

release to Rhone-Poulenc (signed by some Petitioners) and ignoring direct testimony that the additional clause was added to the agreement at Petitioners' insistence to preserve their transfer rights.

8. Did the International Union have a duty of fair representation to Petitioners?

LIST OF ALL PARTIES

The Petitioners are listed as follows:

Albert Akins, Alfonzia Akins, Gene Barker, Ray Bassham, Russell Bishop, Thomas Bishop, Joe Blair, Sammy Boshers, Lonnie Bradburn, Dennis R. Butler, Waylon Carroll, Hazel Chapman, William Claude, Robert Gilliam, Danny Green, Michael Harlow, Gerald Isabell, Terry Jennings, Bobby Kelley, Milton Knowles, Douglas Lindsey, Michael Lindsey, Jimmy Lott, Roland McKnight, Raymond Neely, Terrance Nevette, David Osborn, David Paley, Rickey Patrick, Michael Pilkinton, Gary Riley, Andrew L. Scott, James R. Scott, Jr., Joseph Shyes, Sharon Liles Steiner, Kathy G. Thomason - Administratrix, Robert Tidwell, Joy Ward, Michael Whitwell and Geneva Wiggins.

The Respondents are as listed in the caption of this petition. At the trial level, there were sixty-eight (68) Plaintiffs. Forty (40) of whom, the Petitioners herein, appealed the District Court decision. The Respondent, Zeneca, Inc., changed its name from ICI Americas Inc. after it was granted summary judgment. (For clarity, Zeneca, Inc., is referred to herein as "ICI"; Rhone-Poulenc Inc. and Rhone-Poulenc Basic Chemicals Co. as "Rhone-Poulenc"; International Union of Operating Engineers, AFL-CIO as "International Union"; and Local 912 International Union of Operating Engineers, AFL-CIO as "Local 912".)

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PETITION FOR WRIT OF CERTIORARI

Petitioners pray that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Sixth Circuit entered in the above entitled cause on July 27, 1995. Petitioners duly filed a motion for rehearing, which was denied on September 5, 1995.

OPINIONS BELOW

None of the orders or opinions of the lower Courts has been reported.

JURISDICTION

The jurisdiction of this Court is invoked pursuant to 28 U.S.C. § 1254(1).

STATUTE INVOLVED

The statute involved, Section 301 of the National Labor Relations Act, 29 U.S.C.A. § 185, is reproduced in the Appendix.

STATEMENT OF CASE

Petitioners were employed for many years by Stauffer Chemical Company at two adjacent plants. Petitioners were members of Local 912 and as a condition of membership, automatically became part of the International Union. Their Union dues were split between Local 912 and the International Union. App. 33, 387, 309, 333, 334, 339.

Prior to 1982, there was a single collective bargaining contract governing both

plants. One plant was known as the "furnace plant" and the other was known as the "organic plant". App. 33.

In 1982, Stauffer Chemical Company insisted that the two plants be under separate Collective Bargaining Agreements. The employees agreed to separate contracts on condition that employees who had seniority to transfer between the two plants should retain a one time transfer right to the other plant. App. 32, 34, 337-343.

A separate written agreement was entered into on September 13, 1982, promising Petitioners and other qualifying employees a one time right to transfer to the other plant in the event of layoff at their plant. This agreement was commonly referred to as the "Cross-Bumping Agreement". It was also incorporated by reference into the separate Collective Bargaining Agreements for the two plants. App. 34, 36.

In 1987, ICI purchased both plants and operated them under the 1985 Collective Bargaining Agreements. Later in 1987, ICI sold the furnace plant to Rhone-Poulenc but retained the organic plant and continued to operate it under the 1985 Collective Bargaining Agreement for the organic plant executed by Stauffer Chemical Company. App. 37, 39.

Rhone-Poulenc operated the furnace plant under the 1985 Stauffer Chemical Company Collective Bargaining Agreement for the furnace plant. Both ICI and Rhone-Poulenc incorporated the Cross-Bumping Agreement by reference into the respective 1988 Collective Bargaining Agreements for the two plants. Rhone-Poulenc again incorporated the Cross-Bumping Agreement into its 1991 contract.[1] App. 39, 406.

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[1]At the trial, Rhone-Poulenc stipulated it was responsible for any liability of Stauffer Chemical Company and the action was dismissed as to Stauffer Chemical Company. App. 410-413, 165.

The Union (both International and Local) continued to represent both bargaining units after the execution in 1982 of the Cross-Bumping Agreement which established conflicting interests between the two bargaining units. The International Union participated in the 1982 negotiations and in the subsequent negotiations in 1985 and 1988 for both plants. App. 40, 344-365, 300, 321, 328, 337-343.

In an internal memorandum of 9/13/88, Rhone-Poulenc noted that it had reviewed the Cross-Bumping Agreement with ICI and that the furnace plant had 135 remaining employees with the described seniority. It further noted that "[a]s we have discussed, the liability, if any, rests with the Company that lays off and cannot force the remedy of the Agreement on the opposite Company". App. 228-235.

In the same memorandum of 9/13/88, Rhone-Poulenc concluded that "[i]f the cross bumping agreement represents a significant liability to the Company it then must also represent a significant asset to the employees". Rhone-Poulenc concluded that it must be resolved to compensate the employees for this asset. App. 228-235, 312.

On June 20, 1990, Rhone-Poulenc announced the closing of the furnace plant with layoffs, including Petitioners, to begin in February of 1991. As a result, Local 912, in a letter of June 26, 1990, to the International Union, requested an interpretation of XXIV(11)(e) of the Union's Constitution as it applied to Petitioners and the anticipated ICI contract renewal in June of 1991. App. 41, 236-247.

The letter pointed out that Petitioners' bargaining unit of 250 employees outnumbered the 125 employees in the ICI

bargaining unit. The concern was that Petitioners' bargaining unit would reject the ICI contract[2] and that the "end result" would be that Petitioners would bump less senior employees in the ICI bargaining unit, causing ICI employees to be laid off. In a nonsensical reply of July 27, 1990, the International Union, noting that the question presented was whether Petitioners should be allowed to vote on the ICI contract, failed to answer the question asked. App. 236-250, 42, 74-78.

On October 16, 1990, Local 912, with no attempt to utilize grievance procedures, filed a declaratory judgment action against ICI and Rhone-Poulenc requesting the Court to determine the validity of the Cross-Bumping Agreement and rights of the employees thereunder. No Respondent filed

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[2]The testimony of Mr. Carroll confirms the ICI contract would have indeed been rejected by the furnace plant bargaining unit. App. 296, 297.

a motion for summary judgment or dismissal in that "friendly lawsuit".[3] App. 255-259, 43, 328-331.

The layoffs scheduled for February, 1991, were postponed to begin the first week of July, 1991. The Union and the corporate Respondents waited eight months, knowing that the 1988 ICI contract would expire in June of 1991, thereby permitting ICI to agree with the ICI bargaining unit to remove the Cross-Bumping Agreement from the contract for the organic plant. App. 43-45, 310-313.

In a letter dated December 12, 1990 (App. 260-272), to Local 912 concerning the declaratory judgment action, ICI stated in part as follows:

> ... Thus, the only controversy revealed by the complaint is one between the Rhone-Poulenc employees and

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[3] In this case, which is much more complicated, ICI's motion to dismiss was filed (R. 20) in less than two months and Rhone-Poulenc's motion to dismiss or for summary judgment was filed three months after the complaint (R. 51).

the ICI employees, both of which groups the Union is supposed to represent. Unless and until the Union files in court a document claiming that the ICI employees (who the Union represents) should lose their jobs to laid off Rhone-Poulenc workers, there is no controversy between ICI and Local 912, and the case must be dismissed. We believe there is a serious question as to whether the officers of Local 912 are really ready to state in writing that ICI's workers should be put on the street in order to make way for laid off employees with lesser skills who are employed by another company.

...Local 912's representatives also would need to testify that they believe the ICI employees should be forced to give up their jobs to employees from Rhone-Poulenc.

...

....ICI is prepared at the same time to negotiate a preferential hiring arrangement whereby laid off Rhone-Poulenc workers, meeting agreed qualifications, would be hired at the Organic Plant as the Specialties group creates new

> employment opportunities in the future.
>
> ...
>
> In light of these factors, we recommend that your client seriously consider ICI's proposal. My instructions are to seek an early response and, absent meaningful progress toward agreement, to aggressively pursue dismissal of the lawsuit.[4]

From the closing announcement in June of 1990 through the execution of the new ICI contract on June 11, 1991, Local 912 continually represented to Petitioners that they did not have to be concerned about the ICI negotiations because the organic plant bargaining unit could not affect their rights. App. 44, 45, 298, 299, 309-312, 315-328, 334, 335.

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[4] In its letter, ICI listed numerous reasons the complaint was legally deficient on its face. Since ICI did not "aggressively pursue dismissal of the lawsuit", some agreement was apparently reached between ICI and the Union. Local 912 did not inform the Petitioners or any member of the bargaining unit for the furnace plant of the above settlement offer. App. 260-272, 300, 301, 331, 339.

Shortly after the execution of the June 11, 1991, ICI contract, at the next Union meeting, Local 912 informed the Petitioners for the first time that their rights under the Cross-Bumping Agreement had been terminated by the agreement between ICI and the bargaining unit for the organic plant. If Petitioners had known earlier that their rights could be affected by the organic plant bargaining unit, they would have insisted on participation. App. 296, 297, 44, 45, 299, 318.

No member from the bargaining unit at the furnace plant was permitted to participate in the negotiations relating to the organic plant. No member of the bargaining unit from the furnace plant ever agreed to or authorized the deletion of the September 13, 1982, agreement. The June, 1991 agreement between ICI Americas Inc. and Local Union No. 912 was never authorized or approved by, nor submitted to, the bargaining unit for

the furnace plant. (Paragraph 17 of complaint as admitted by answer of Local 912.) See also, App. 296, 297, 74, 75.

Petitioners requested assistance from the General President of the International Union by letter of July 10, 1991. They pointed out that Local 912 had a conflict of interest and appeared to be working against their best interest. App. 273-277, 415, 46.

By letter of July 16, 1991 (App. 278-290, 328-331, 337-343, 79-82), to the International Union, Local Union 912 stated in part as follows:

> ...In addition, I have talked with Richard Griffin and Helen Morgan in IUOE's legal department as to the general problem involved.
>
> ...
>
> ...Suppose Rhone-Poulenc grants the grievance! How can Local 912 make ICI take the employees from Rhone-Poulenc. If Local 912 goes to court in an effort to do

> so, where does that leave Local 912 with its members at ICI as to fair and proper representation? This is one of the dilemmas I discussed with Branstetter, our attorney. This is one of the reasons he recommended against the grievance route....I have sought guidance from your office and IUOE's legal department as well as Local 912's Attorneys.

By letter of August 5, 1991, the International Union contended erroneously it had no authority to intervene. The International Union further stated "that it appears that Local Union No. 912 has acted vigorously and in good faith...to protect the interest of all members." App. 291, 292, 81.

On September 27, 1991, Local 912 discontinued the grievance against Rhone-Poulenc. It notified Petitioners that Local 912 would take no further action. App. 293-295, 306, 307, 322-325.

Some Petitioners, in exchange for severance pay, signed a waiver of certain

obligations against Rhone-Poulenc. The waiver was subject to an exception "as provided under the terms of" the severance pay agreement. At Petitioners' insistence, a provision was included in the severance pay agreement concerning the effect of qualifying at the organic plant. Qualifying was required if Petitioners exercised their transfer rights. It was Petitioners' intention to not surrender their transfer rights by accepting severance pay as reflected by the provision inserted into the severance pay agreement. App. 65, 305, 306, 314, 332, 333, 336, 337.

The Union Constitution (App. 366-404) provides as follows:

1. It is "a contract between the member, his Local Union, the International Union and every other member therein". The "organization shall be known as the International Union of Operating Engineers". One of its purposes is to assist "Local Unions

in negotiating collective bargaining agreements". Copies of all Collective Bargaining Agreements and modifications thereof "shall be filed with the General President immediately after execution".

2. The International Union has the power to "issue charters for Local Unions", "suspend and revoke any of said charters", "supervise the operation of Local Unions", "appoint supervisors and receivers when necessary", "prefer charges against Local Unions", "order trials with authority to discipline those affected", "adopt as part of the Constitution a procedure for the government and regulation of Local Unions", "provide for the general welfare of the organization and its members", "take all steps necessary to protect the interest of the organization", and "all other rights, powers, privileges and immunities not herein specifically denied".

3. The International Union, through its General President, is empowered to interpret the Constitution "and decide questions of law arising thereunder" [Article VI(2)] and has the "power to require Local Unions...and members to comply with this Constitution and any lawful rulings or orders of the International Union" [Article VI(3)].

4. The International Union, through its General President, for the purpose of "assuring the performance of collective bargaining agreements or other duties of a bargaining representative" has "full power to suspend or remove such Local Officers, suspend or revoke charters of such Local Unions or place such Local Unions and their officers and members under International Supervision" [Article VI(3)].

5. The General President "shall be strictly accountable and responsible for the faithful performance of his duties and

shall administer and enforce every law, rule, regulation and requirement of the Constitution, Ritual and Obligation" [Article VI(5)].

6. Collective Bargaining Agreements and modifications thereof "shall not be executed until they have been presented at the next membership meeting following the negotiation of the proposed agreement and have been approved by the membership affected" [Article XXIV(11)(e)]. App. 74, 75.

REASONS FOR GRANTING PETITION

1. The decision of the Sixth Circuit was limited to the arbitrary conduct standard and did not consider the lack of good faith or the failure to treat all members equally as required by Vaca v. Sipes, 386 U.S. 171, 177, 87 S.Ct. 903, 910, 17 L.Ed.2d 842, 850 (1967); Air Line Pilots Association, International v. O'Neill, 499 U.S. _____, 111 S.Ct. 1127, 1132, 1134, 1135 (ns. 6 and 6),

113 L.Ed.2d 51 (1991). Vaca sets a three part standard for determining whether a Union violates its duty of fair representation. It must (1) treat all members equally; (2) act with good faith and honesty; and (3) avoid arbitrary conduct. The Sixth Circuit only referred to the arbitrary standard and did not refer to the standards for equal treatment or good faith and honesty.

The District Court, on the summary judgment motions, held there had been a "complete sellout" by the Local Union and that there was substantial evidence (Union's letter of July 16, 1991) that the Union did not pursue a grievance on behalf of Plaintiffs because of its duty to the ICI members.[5] App. 87-93.

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[5]Appellants' Brief in the Sixth Circuit clearly detailed the numerous acts of the Union that constituted breaches of its duty of fair representation. (App.431-517.) The Sixth Circuit's conclusion that one of the acts involving the Local Union and ICI was not raised until Appellants' Reply Brief (App. 518-561), is not consistent with the issues, facts and argument included in Appellants' Brief.

At the trial, the District Court held that the Rhone-Poulenc contract was unenforceable because of impossibility. The District Court indicated that since a hybrid § 301 action was involved, it was not necessary to make findings of the Union's breach of its duty of fair representation.[6] App. 128-165.

2. The decision of the Sixth Circuit, construing the arbitrary standard of the O'Neill decision, is in conflict with Lewis v. Tuscan Dairy Farms, Inc., 25 F.3rd 1138, 1142, 1143, 1145 (2nd Cir. 1994) and Aquinaga v. United Food and Comm. Workers Int'l Union, 993 F.2d 1463, 1470, 1472 (10th Cir. 1993), cert. den., 114 S.Ct. 880 (1994). The Lewis decision holds that the Union breached its duty of fair representation under

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[6]The Sixth Circuit rejected the impossibility argument but held that the Union had not violated its duty of fair representation. The Sixth Circuit ignored that the Union had stated that a reason for the failure to pursue the grievance was its duty to the ICI employees. The impossibility defense was clearly without merit. Restatement, Second, Contracts, Section 266; McCalden v. California Library Ass'n, 919 F.2d 538, 543 (9th Cir. 1990) (955 F.2d 1214, 1219).

the O'Neill standard where a Union misrepresented to employees their rights under an agreement and failed to submit, as required by the bylaws, a secret agreement with the employer to the employees for approval and ratification.

3. The decision of the Sixth Circuit is contrary to Steele v. L & N Railroad Co., 323 U.S. 192, 202, 203, 207, 65 S.Ct. 226, 232-234, 89 L.Ed. 173 (1944). The crux of the Sixth Circuit's decision is that Petitioners' rights were destroyed when ICI executed the June, 1991, contract with its own employees. In Steele, it was held an employer may not claim the benefit of a contract which the Union is not authorized to make. See also, Brotherhood of Locomotive Firemen, etc. v. Mitchell, 190 F.2d 308, 312, 313 (5th Cir. 1951).

In Steele and Mitchell, the Union represented both nonmembers and members

and discriminated in favor of members. "Power to act for" involves a duty to act in the employees' interest and behalf. Failure to inform or give employees it represents an opportunity to be heard, coupled with hostility and disloyalty to deprive Plaintiff of employment "in order to create a monopoly of employment" for the favored bargaining unit, should not be tolerated in a Union. Steele v. L & N Railroad Co., supra, 65 S.Ct. at 228-230, 232, 233.

All of the Respondents must have surmised that their best hope of escaping their clear legal obligations was to let ICI agree with its own employees to delete the 1982 Cross-Bumping Agreement. After all, ICI would be making its agreement with its employees who would be displaced by Petitioners.[7]

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[7]Exactly what the Union, both the International and Local 912, did here should be examined. It had a conflict of interest and for its own interest, it favored less senior employees. This violated the very

Respondents should not be permitted to retain the benefits received from inducing the Union to breach its contractual and trust obligations to Petitioners. Steele v. L & N Railroad Co., supra.; Brotherhood of Locomotive Firemen, etc. v. Mitchell, supra; Restatement, Second, Contracts, Sections 193, 194; Restatement, Second, Trusts, Section 170.

4. The Sixth Circuit decision is not only contrary to Wooddell v. International Bd. of Elec. Workers, 502 U.S. _____, 112 S.Ct. 494, 116 L.Ed.2d 419 (1991), but also makes Wooddell meaningless. The Wooddell case involved the enforcement of contract rights similar to the contract claims involved herein. Wooddell, supra, 112 S.Ct. at 499.

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cornerstone of the Union movement, which is seniority. Indeed, in Humphrey v. Moore, 375 U.S. 335, 84 S. Ct. 363, 11 L.Ed.2d 370 (1964), the Supreme Court approved the Union's decision when it favored the most senior employees. The Court emphasized that this was the accepted and standard procedure. Here, the Union, acting to protect itself from a conflict of interest situation, favored the least senior employees. Humphrey v. Moore, supra, 375 U.S. at 349, 84 S.Ct. at 372, 11 L.Ed.2d at 382; (App 86-90).

Petitioners paid their dues for years in exchange for the Union providing the services covered by Articles VI(2), (3), (5) and XXIV(11)(e) of the Constitution and the Union (International and Local) failed to provide those services.[8]

The Union's interpretation of the contract is not binding on the Court. TCP Industries, Inc. v. Uniroyal, Inc., 661 F.2d 542, 549 (6th Cir. 1981); Local 783 v. General Electric Co., 471 F.2d 751, 756-758 (6th Cir.

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[8]Article VI(3) indicates a broad range of powers available to the International Union, including the ultimate of trusteeship. At the trial, Petitioners stated that a trusteeship was not necessary but that the International Union had a broad range of powers to correct the deficiencies involved. (App. 414-430.) Both the Sixth Circuit and the District Court construed this statement as a waiver of any rights under Article VI(3). The broad language of Article VI(3) and the statements of counsel in the trial transcript show there was no waiver. (App. 414-430, 547, 548.) The Sixth Circuit also indicates in a footnote, which appears to contradict the succeeding paragraph of the opinion, that Plaintiffs completely failed to pursue below a claim under Article VI(5). The Pre-Trial Order and the trial transcript show that Petitioners expressly claimed and argued that the Union violated Article VI(5). (App. 416, 417.) In the Pre-Trial Order, Petitioners specifically stated they were claiming that "the International Union breached its contractual obligations to Plaintiffs under Section VI(2), (3) and (5) and XXIV(11)(e) of the IUOE Constitution". (App. 179, 180, 547, 208-211.

1973), cert. den., 414 U.S. 822, 94 S.Ct. 120, 38 L.Ed.2d 55, and it is certainly true, where as here, the Union urges an unreasonable interpretation of its constitution. Reich v. Intern. All. of Theatrical Stage Emp., 32 F.3rd 512, 515, 516 (11th Cir. September 116, 1994).[9]

5. This case presents important issues of the responsibility of an International Union. Here, we have a standard Union Constitution where the Union promises to provide the essential services required of a Union. The International Union is a principal and party to the constitutional contract.[10] In

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[9]The Sixth Circuit cites Maher v. International Bhd. of Elec. Workers, 15 F.3rd 711, 714 (7th Cir. 1994), to indicate it must defer to the Union's interpretation if it is not unreasonable. However, the Maher case emphasized that this difference was only required where the interpretation did "not conflict with the plain meaning of any provision of the constitution", supra, 15 F.3rd at 714. Here, the Union's interpretation is directly contrary to the express language of the Constitution.

[10]The International Union here was a principal to the contract. However, the Sixth Circuit referred to agency theories and cited Moore v. Local Union 569 of Int'l Bhd. of Elec. Workers, 989 F.2d 1534 (9th Cir. 1993), cert. den., 114 S.Ct. 1066 (1994) and Shimman v.

addition to its liability as a principal, there is overwhelming documentary and other evidence showing the International Union's full participation in and prior knowledge of the Local Union's improper actions.

The principal assets of the Union Organization are held by the International Union. The Local Union is financially irresponsible. It has no significant assets. It carries no liability insurance. The International Union directs and controls the Local Union. Basically, the International Union uses the Local Union as a shield to protect its wealth from valid claims. App. 483, 484, 505-507.

Frank, 625 F.2d 80 (6th Cir. 1980). Both of these cases involved tort-type claims as contrasted with the contract claims involved here. The Union relies upon Brenner v. Local 514 United Brotherhood of Carpenters, 927 F.2d 1283 (3rd Cir. 1991), which also involved claims primarily in the nature of tort. Brenner was decided on April 18, 1991, whereas Wooddell was argued on October 16, 1991, and decided on December 4, 1991, so the Brenner Court did not have the advantage of the Supreme Court's ruling in Wooddell at the time of its decision.

6. The decision of the Sixth Circuit failed to conform with the standards for review of a dismissal by summary judgment or by grant of judgment as a matter of law contrary to Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 255, 106 S.Ct. 2505, 2513, 91 L.Ed.2d 202 (1986). The Sixth Circuit decision usurped the province of the jury in resolving ambiguities, inferences, factual disputes and weight to be given facts.

a. Conspiracy of Respondents. The declaratory judgment action was a sham. None of the parties to the declaratory judgment action filed a motion to dismiss or for summary judgment. Instead, they simply waited eight months until ICI, with the Local Union, could remove the Cross-Bumping Agreement from the Collective Bargaining Agreement for the organic plant. The layoffs, which had been scheduled for February of 1991, were delayed by Rhone-

Poulenc until immediately after Local Union 912 and ICI executed the new contract in June of 1991. Throughout this delay, Local Union 912 continually represented to Plaintiffs, with full knowledge that such representations were false, that the actions of the ICI bargaining unit could not affect Plaintiffs' rights.[11]

Tennessee uniformly recognizes the tort of conspiracy. Nashville Memorial Hospital, Inc. v. Binkley, 534 S.W.2d 318, 321 (Tenn. 1976); Hayes v. Schweikart's Upholstering Co., 402 S.W.2d 472 (Tenn. App. 1966 - only necessary to show a working in harmony to promote a common purpose); Franklin v. Green, 342 S.W.2d 233, 236 (Tenn. App.

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[11]The Sixth Circuit states there was no proof of malice. The Union's own correspondence shows that in the summer of 1990, it was well aware that Petitioners' rights would be affected. Yet, it continually falsely represented to Petitioners that their rights would not be affected. It is difficult to conceive of more blatant malice and hostility. Merely because Union officials smiled at Petitioners while they made such false representations to them does not relieve the malice and hostility of the admitted acts.

1960). See also, Allen v. Allied Plant of Nashville, 881 F.2d 291 (6th Cir. 1989).

b. Futility of pursuing grievance. The District Court held "[t]he contention of the R-P defendants that merely permitting the Plaintiffs to transfer to the organic plant satisfies their obligations is fanciful".[12] The District Court further stated that "[The] Cross-Bumping Agreement unambiguously provides that senior employees who are laid off at the furnace plant may transfer to the organic plant" and further stated that "contracts are to be kept".[13]

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[12]Petitioners did not "request" their transfer rights. Instead, they sent a formal "Notice of Intent" to exercise their transfer rights under the Cross-Bumping Agreement. (App. 251-254, 225-227, 562, 563.)

[13]The summary judgment opinion stated (App. 55-57):

> ...Granted, they may have difficulty forcing ICIA to give the Plaintiffs jobs at the organic plant, especially since the cross-bumping agreement has been deleted from the organic plant collective bargaining agreement, but the R-P defendants have only themselves to blame. Before their purchase of the Stauffer Chemical Company stock in 1987, ordinary due diligence should have made them aware

Indeed, even Rhone-Poulenc, in its internal memorandum dated September 13, 1988, recognized its potential liability.

c. If Rhone-Poulenc had contractual obligations to Petitioners, as found by the District Court and assumed by the Court of Appeals, certainly it was unreasonable to contend that pursuing a grievance for breach of such contract would be futile. Clearly this is true where Rhone-Poulenc had recognized that liability, if any, would fall on the company that laid off and could not force the cross-bumping rights on

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of the obligations of the corporation they were purchasing....Stauffer Chemical Company had promised the plaintiffs jobs at the organic plant, and when the R-P defendants bought Stauffer Chemical Company, they assumed that obligation. Prior to the purchase of Stauffer Chemical Company, the R-P defendants could have contracted with ICIA to reserve jobs at the organic plant or they could have contracted with Local 912 to surrender the plaintiffs' right to transfer. However, they did neither....The fact that ICIA has refused to accept the laid-off furnace plant employees does not relieve R-P Basic of its own independent promise to them. Pacta sunt servanda -- contracts are to be kept.

the opposite company. Indeed, the Union was fully aware of this position of Rhone-Poulenc at the time it refused to pursue the grievance. See also, App. 84-94.

d. Waiver signed by some Petitioners. The waiver contained a provision for a further exception "as provided under the terms of the memorandum of understanding". And the memorandum of understanding contained a clause inserted at the insistence of Petitioners to protect their rights under the Cross-Bumping Agreement. The inserted clause was meaningless if Petitioners intended to release their transfer rights.

Respectfully submitted,

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FILED JUL 27 1995
LEONARD GREEN, CLERK

NOT FOR PUBLICATION

No. 94-5132

UNITED STATES COURT OF APPEALS

FOR THE SIXTH CIRCUIT

ALBERT AKINS, et al.,

Plaintiffs-Appellants,

TONY BROCK, et al.,

Plaintiffs,

v.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE MIDDLE DISTRICT OF TENNESSEE

ZENECA, INC.; RHONE-POULENC, INC.; RHONE-POULENC BASIC CHEMICALS CO,; STAUFFER CHEMICAL CO.; INTERNATIONAL UNION OF OPERATING ENGINEERS, AFL-CIO; LOCAL 912 INTERNATIONAL UNION OF OPERATING ENGINEERS, AFL-CIO,

Defendants-Appellees.

Before: **CONTIE, MILBURN and SILER**, Circuit Judges.

PER CURIAM. Plaintiff Albert Akins and 39 co-plaintiffs, all members of the Local 912

International Union of Operating Engineers ("Local 912") and former employees of Rhone-Poulenc, Inc. ("R-P"), challenge the district court's grant of summary judgment, Fed. R. Civ. P. 56(c), and/or judgment as a matter of law, Fed. R. Civ. P. 50, to Defendants R-P, Zeneca, Inc. (formerly ICI Americas Inc. and hereafter "ICIA"), the International Union of Operating Engineers ("IUOE"), and Local 912 on plaintiffs' claims under § 301 of the Labor Management Relations Act and state law. For the reasons stated herein, we affirm the decision of the district court.

I.

As determined by the district court, the following facts are not in dispute:

Stauffer Chemical Company owned and operated two chemical plants in Mt. Pleasant, Tennessee. One, which is commonly called the "furnace plant," produced phosphorous. The other, which is commonly called the "organic

plant," produced herbicides and pesticides. Workers at both plants were represented by Local 912. These workers constituted a single collective bargaining unit with one common seniority list. One collective bargaining agreement ("CBA") governed the terms of employment for both plants.

In 1982, Stauffer proposed splitting the single collective bargaining unit into two separate units. Local 912 strongly objected to the proposal. However, after negotiations, the parties reached an agreement. Local 912 consented to divide the furnace plant and the organic plant employees into separate bargaining units, provided that Stauffer would permit workers at each plant to "cross-bump" to the other plant. This meant in the event of layoff at one plant, a senior employee from that plant could transfer to the other plant and displace a junior employee. The parties memorialized their bargain in a memorandum of

agreement, commonly referred to as the "cross-bumping agreement."

At roughly the same time that they executed the cross-bumping agreement, Local 912 and Stauffer entered into two new CBAs: one for the furnace plant and the other for the organic plant. Each CBA provided that the cross-bumping agreement "shall be considered as supplemental to the [CBA] between the parties ... and shall remain in full force and effect during the period of such [CBA] unless modified by the parties in writing." These CBAs remained in effect for three years.

In 1985, Local 912 and Stauffer negotiated new three-year CBAs for the two plants, each providing that the cross-bumping agreement was supplemental and that it would remain in effect for the duration of the current CBAs. In July 1987, prior to the expiration of the 1985 CBAs, various corporate affiliates of a multinational corporation,

Imperial Chemical Industries, P.L.C., purchased Stauffer. One of these affiliates retained the organic plant and merged into defendant ICIA. The other affiliates operated Stauffer's other facilities for a short period before selling them to unrelated companies near the end of 1987. Defendant R-P purchased the furnace plant in December 1987.

Upon the expiration of the 1985 CBAs, each of the new owners negotiated its own CBA with Local 912. During the negotiations, ICIA and R-P Basic tried to persuade Local 912 to delete all references to the cross-bumping agreement. The union, however, refused. The 1988 CBAs for both companies stated that the cross-bumping was considered supplemental and that it would remain in effect for the duration of the CBAs.

In June 1990, R-P Basic announced that it was going to close the furnace plant and that layoffs were expected to begin in February

1991. Anticipating that the organic plant employees and ICIA would seek to rescind the cross-bumping agreement, Local 912's business manager, James Kincade, sought the advice of the IUOE. In a letter dated June 26, 1990, Kincade wrote to Frank Hanley, General President of the IUOE, and inquired whether Section XXIV(11)(e) of the IUOE Constitution, which requires that proposed modifications to CBAs be "approved by the membership affected," would permit the organic plant bargaining unit to rescind the cross-bumping agreement without the consent of the furnace plant bargaining unit. President Hanley's reply did not answer Kincade's question.

On October 16, 1990, pursuant to the advice of its local counsel, Local 912 f~led a declaratory judgment action in this Court against ICIA and R-P Basic, asking the district court to "declare whether employees from the R-P Furnace Plant have the right to

bump employees in the ICI[A] organic plant pursuant to the [cross-bumping] agreement." After commencement of the declaratory judgment action, R-P Basic indicated for the first time that the layoffs might be delayed. In fact, the first layoffs did not begin until July 1991. As the expiration of the organic plant CBA approached, the furnace plant employees became increasingly anxious that the organic plant employees would delete the cross-bumping agreement from their new CBA with ICIA. Nevertheless, Kincade assured them that nothing that ICIA might do could affect their right to transfer pursuant to the cross-bumping agreement.

On June 11, 1991, ICIA and Local 912 entered into a new CBA. As the furnace plant employees had feared, the parties deleted all references to the cross-bumping agreement. At a meeting with the furnace plant employees, Kincade informed them that he decided that

ICIA could affect their transfer rights. He also indicated that Local 912 had dismissed the declaratory judgment action as moot. Upset with this news, several of the plaintiffs wrote to Frank Hanley, General President of the IUOE, seeking advice. Hanley responded that the matter was purely local and did not concern the IUOE.

In August, 1991, subsequent to some layoffs, Kincade assisted in filing a grievance with R-P. R-P denied the grievance, insisting that it had fulfilled all of its obligations under the cross-bumping agreement. R-P then provided forms on which employees could request a job with ICIA and submitted the forms to ICIA. ICIA, however, returned the forms.

In November 1991, plaintiffs sued the defendants for violations of § 301 of the LMRA, 29 U.S.C. § 185; the union constitution; and state law. The district court granted

summary judgment in full to ICIA and in part to the remaining defendants, thereby disposing of plaintiffs' state law claims and a number of other theories. The case then proceeded to trial. After plaintiffs concluded their proof, the remaining defendants moved for judgment as a matter of law pursuant to Fed. R. Civ. P. 50(b).[1] The district court granted defendants' motion.

II.

This court reviews a grant of summary judgment de novo. Summary judgment is appropriate if there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law. Fed. R. Civ. P. 56(c). All reasonable inferences must be made in favor of the non-moving party in determining whether a genuine issue of material fact exists. Kunz v. United Food

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[1]Defendant Stauffer was dismissed without objection and is not a party to this appeal.

Commercial Workers Local 876, 5 F.3d 1006, 1008-09 (6th Cir. 1993). Likewise, this court reviews a grant of judgment as a matter of law de novo. This court determines whether, after viewing the evidence in the light most favorable to the non-moving party, "there is a complete absence of pleading or proof on an issue or issues material to the cause of action or ... no controverted issues of fact upon which reasonable men could differ." Kitchen v. Chippewa Valley Schs., 825 F.2d 1004, 1015 (6th Cir. 1987). If so, judgment as a matter of law must be granted to the moving party.

A) Plaintiffs' State Law Claims.

Plaintiffs contend that: (1) R-P and ICIA induced the unions to "breach [their] contractual and trust obligations to plaintiffs"; and (2) defendants conspired to deprive plaintiffs of their "vested contractual rights." Tennessee courts

recognize both a common law and statutory cause of action for civil conspiracy. Both require proof of a "combination between two or more persons to accomplish by concert an unlawful purpose or to accomplish a purpose, not in itself unlawful, by unlawful means." Hardin v. Caldwell, 695 S.W.2d 189, 191 (Tenn. Ct. App. 1985). Further, both require plaintiffs to first prove the existence of an underlying tort. Forrester v. Stockstill, 869 S.W.2d 328, 330 (Tenn. 1994). Failure to do so precludes recovery for civil conspiracy. See id. ("if the [underlying] claim fails, then the claim for conspiracy must also fail, for '[i]t cannot be that a conspiracy to do a thing is actionable where the thing itself would not be."' (citing Felts v. Paradise, 158 S.W.2d 727, 729 (Tenn. 1942)).

To this end, plaintiffs argue that defendants tortiously interfered with certain contracts, a claim that requires plaintiffs to

establish that: (1) a legal contract existed; (2) the wrongdoer knew of the contract; (3) the wrongdoer intended to induce breach; (4) the wrongdoer acted with malice; (5) a breach occurred; (6) the wrongdoer caused the breach; and (7) damages resulted. Oak Ridge Precision Indus. Inc. v. First Tenn. Bank Nat'l Ass'n, 835 S.W.2d 25, 29 (Tenn. Ct. App. 1992). A party will not be held liable under this tort for interfering with a contract to which it was a party. Koehler v. Cummings, 380 F.Supp. 1294, 1313 (M.D. Tenn. 1971).

Plaintiffs cannot support their claim of tortious interference with contract, as Local 912 and R-P are parties to the contracts at issue and plaintiffs failed to prove that any defendant acted with actual malice. See Testerman v. Tragesser, 789 S.W.2d 553, 556-57 (Tenn. Ct. App. 1989)(failure to prove actual malice precludes a claim for tortious interference with contract). As the

underlying tort fails, plaintiffs' claim for civil conspiracy fails as a matter of law. The district court, therefore, properly dismissed plaintiffs' state law claims:

B) Plaintiffs' Hybrid § 301 Claim against R-P and Local 912.

Plaintiffs brought a hybrid § 301 cause of action against R-P and Local 912, contending that R-P breached its obligations under the 1988 CBA by failing to obtain jobs for the plaintiffs in the organic plant, and that Local 912 breached its duty of fair representation by failing to pursue a grievance against R-P. In order for an employee to recover in a hybrid § 301 suit against his employer or union, the employee must show *both* that his employer breached the CBA and that the union breached its duty of fair representation. Adcox v. Teledyne,Inc., 21 F.3d 1381, 1386 (6th Cir.), cert. denied, 115 S.Ct. 193 (1994); Kunz, 5 F.3d at 1009.

Failure to establish both precludes recovery against either party.

The district court granted R-P and Local 912 judgment on plaintiffs' hybrid § 301 claim, stating as its basis the following:

> Now the court has determined that, as a matter of law, the defense of impossibility, or what is sometimes called the Doctrine of Impracticability, governs the disposition of this first claim. In this case, as a result of the change of ownership of the two plants, it simply became impossible for Rhone Poulenc to compel another corporation to take its employees.

This ruling is erroneous. As of 1988, when R-P agreed to include by reference the 1982 cross-bumping agreement in the CBA, it knew it could not "perform"[2] under the contract, in the sense that R-P could not force ICIA, a separate corporation with which it had no

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[2]Upon reviewing the contracts at issue, we question whether R-P had any duty under the 1988 CBA or cross-bumping agreement to assist in plaintiffs' transfers to the ICIA plant. For purposes of argument, however, we will treat R-P as having such a duty.

contractual ties, to abide by the cross-bumping agreement. This knowledge precludes R-P's defense of impossibility.

This error does not require a reversal, however, as Local 912 did not violate its duty of fair representation by failing to pursue a grievance against R-P on behalf of plaintiffs. A union breaches its duty of fair representation when it engages in "arbitrary conduct." Vaca v. Sipes, 386 U.S. 171, 177 (1967). A union's actions are arbitrary "only if, in light of the factual and legal landscape at the time of the union's actions, the union's behavior is so far outside a 'wide range of reasonableness' as to be irrational." Air Line Pilots Ass'n. Int'l v. O'Neill, 499 U.S. 65, 67 (1991)(citations omitted); see also Adcox, 21 F.3d at 1387. Local 912's decision to not pursue a grievance against R-P was not arbitrary conduct, as it knew that any grievance would be futile; aside from being

able to supply the necessary forms for filing a request for employment with ICIA (which it did), R-P's "hands were tied." As Local 912 did not breach its duty of fair representation,[3] plaintiffs' hybrid § 301 claim against both R-P and Local 912 fails.[4]

C) Plaintiffs' § 301 Claim against ICIA.

In an effort to prove that ICIA breached its obligations to them, plaintiffs contend that their right to make a one-time transfer

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[3]While plaintiffs also pursued a separate fair representation claim against Local 912 based upon Local 912's conduct of negotiating the deletion of the cross-bumping agreement from the 1991 organic plant CBA without including plaintiffs in the vote, plaintiffs failed to raise this claim in their appellate brief. Instead, plaintiffs attempted to indirectly argue the issue in their reply brief. Given that "[i]ssues raised for the first time in a reply brief are not properly before this court," United States v. Perkins, 994 F.2d 1184, 1191 (6th Cir.)(citations omitted), cert. denied, 114 S.Ct. 279 (1993), we decline to consider the merits of this claim.

[4]Given our resolution of the hybrid § 301 claim, we find it unnecessary to determine the effect of the 1988 memorandum which R-P incorporated in both the 1988 and 1991 CBAs.

to the organic plant is a "vested" right that cannot be modified or abandoned by a later CBA.[5] This circuit recognizes "two basic ways" in which plaintiffs may prove that a right is vested. Cincinnati Typographical Union No. 3, Local 14519 v Gannett Satellite Info. Network, Inc., 17 F.3d 906, 910 (6th Cir. 1994). First, parties may be found to have intended a right to vest if the contract language or extrinsic evidence supports such a conclusion. Id (citations omitted). Second, a court will treat certain rights which the employee works to accumulate over time as vested, even without any evidence of such intent in the contract. The typical examples of this type are severance pay and vacation pay. Id. at

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[5]Plaintiffs also contend that Local 912's 1991 CBA with ICIA is invalid. Any such argument is not properly before this court, however, as this court lacks the jurisdiction under § 301 to decide the validity of CBAs. Adcox, 21 F.3d at 1386.

911. We find that this case implicates neither.

First, neither the language of the cross-bumping agreement[6] nor extrinsic evidence

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[6]The cross-bumping agreement provided:

> Local Union No. 912, International Union of Operating Engineers and Stauffer Chemical Company for its Phosphorus Products Plant (Furnace) and its Intermediate Agricultural Chemicals Plant (Organic), both located in Mt. Pleasant, Tennessee do hereby agree that:
>
> 1. Employees hired prior to September 11, 1982 may exercise layoff rights as described below with the exception of current furnace plant employees who do not have the seniority to displace current employees at the organic plant.
>
> 2. Employees shall first exhaust their rights under the layoff procedures described in the [CBA] covering the plant to which they are assigned.
>
> 3. Employees of either plant covered by this Memorandum of Agreement who are to be laid off from their plant may then displace junior employees in the other plant provided that:
>
> a. The employee displaced shall be the junior employee in the classification.
>
> b. The employee must qualify for such classification after a reasonable training period of fifteen (15) working days or less at the furnace plant. If the employee fails to qualify, he will not be allowed to make further choices of jobs but rather will be laid off.

indicates that the employees' right to transfer was intended to be vested. Rather, the 1982, 1985 and 1988 CBAs stated explicitly that the cross-bumping agreement was "supplemental to the Collective Bargaining Agreement between the parties ... and shall remain in full force and effect during the period of such Collective Bargaining Agreement unless modified by the parties in writing."

Second, plaintiffs offer this court no support for treating their right to transfer as the second type of vested right. While plaintiffs cite a number of cases, all are distinguishable from the present situation. In both Cincinnati Newspaper Guild v.

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4. Employees who elect to move from one plant to another will become an employee of the plant to which they have moved and will have no further rights to return to the other plant.

5. Employees who are given the opportunity to exercise their right under this Memorandum of Agreement and who decline to do so shall forfeit future rights under this Agreement.

Cincinnati Enquirer, Inc., 863 F.2d 439, 440 (6th Cir. 1988), and Heheman v. E.W. Scripps Co., 661 F.2d 1115, 1121 (6th Cir. 1981), cert. denied, 456 U.S. 991 (1982), the contracts at issue contained either an automatic renewal term or a term indicating that the agreement was permanent until modification by both parties. Neither the CBAs nor the cross-bumping agreement of the present case contained such a term. Further, the cases involving pension and retiree benefits are unpersuasive, as the Supreme Court has explicitly held those rights to be vested. See, e.g., United Mine Workers of America Health & Retirement Funds v. Robinson, 455 U.S. 562, 575 n.14 (1982)(pension benefits); Weimer v. Kurz-Kasch, Inc., 773 F.2d 669, 672-73 (6th Cir. 1985)(retiree benefits). The dismissal of the § 301 claim against ICIA was therefore proper.

D) The Validity of the Employee Releases.

In exchange for releasing the company from most of its obligations to them, a number of the plaintiffs accepted severance pay from R-P in amounts depending, in part, on the length of their employment. The release explicitly stated:

> I hereby release the Company from any and all pending and future obligations and liabilities to me arising out of employment with the Company, except for any unemployment compensation or worker's compensation claims that I may make and except as provided under the terms of the Memorandum of Understanding.

(emphasis added). Based on this release, the district court dismissed all the claims against R-P made by those plaintiffs who signed a release. Plaintiffs challenge this decision, contending that the release is: (1) unconscionable and a product of overreaching by R-P; (2) void for want of consideration since no additional amount was paid to employees with potential transfer rights; and

(3) ambiguous, thereby requiring a jury determination.

We disagree. Plaintiffs offer this court no basis for finding unconscionability or overreaching. Further, the plaintiffs received severance pay in consideration of their release. In fact, the amount paid to the employee depended, in part, upon the length of their employment (i.e., seniority with the company), thereby implicitly taking into account plaintiffs' potential transfer rights. Finally, the language of the release is clear and unambiguous; it specifically informed the plaintiffs that they were waiving any and all claims against R-P except for workers compensation or unemployment compensation claims.

E) Breach of the IUOE Constitution.

Plaintiffs contend that Local 912 and IUOE, as one union, violated Article VI(2), (3), and (5) and Article XXIV(11)(e) of the

IUOE Constitution. While we agree that plaintiffs, as third-party beneficiaries of the IUOE Constitution, may sue to enforce the provisions of that constitution, see Wooddell v. International Bhd. of Elec. Workers, 502 U.S. 93, 98-99 (1991), Local 912 and IUOE are separate entities and should be treated as such.[7] For this reason, we will consider the claims against each union separately.

1) Local 912.

Article XXIV(11)(e) of the Union Constitution provides:

> Proposed collective bargaining agreements and modifications

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[7]"[W]ithout evidence that [IUOE] instigated, supported, ratified or encouraged the Local's activities or that the Local acted pursuant to its agreement with the International, there [is] no agency relationship as a matter of law." Moore v. Local Union 569 of Int'l Bhd. of Elec. Workers, 989 F.2d 1534, 1543 (9th Cir. 1993), cert denied, 114 S.Ct. 1066 (1994). While plaintiffs use the words "full participant" and "authorized," they offer this court no proof of such, and, therefore, have failed to establish an agency relationship. See Shimman v. Frank, 625 F.2d 80 (6th Cir. 1980).

> thereof may be negotiated for Local Unions by the Business Manager, by a committee, by the Local Executive Board, or by the Business Representative. Such agreements and modifications thereof shall not be executed until they have been presented at the next membership meeting following the negotiation of the proposed agreement and have been approved by the membership affected, provided, however, that a Local Union may delegate to its Local Executive Board or to its bargaining committee authority to approve such agreements and modifications without such submission of the same to vote of its membership.

Plaintiffs contend that Local 912 violated this provision by failing to submit the 1991 organic plant CBA to a vote by the entire membership prior to accepting the contract.

We disagree. The membership of each unit elected its own negotiating committee, each having the authority pursuant to Article XXIV(11)(e) to approve agreements and modifications for their particular plant without submission to a vote of the entire membership. Hence, just as the R-P bargaining

committee alone voted on CBA agreements for R-P, the ICIA bargaining committee had the authority to separately vote on the 1991 CBA with ICIA. Local 912 did not violate the IUOE Constitution.

2) IUOE.

Plaintiffs contend that IUOE breached Article VI(2), which provides that the General President "shall ... be empowered to interpret the provisions of the Constitution and decide questions of law arising thereunder," when General President Hanley, in response to Kincade's letter requesting advice regarding Article XXIV(11)(e), stated that Article XXIV(11)(e) only applied to proposed modifications of a CBA. Plaintiffs characterize this response as inappropriate and nonsensical.

Given that we "must defer to a union's interpretation of its own constitution so long as the interpretation is not unreasonable,"

Maher v. International Bhd. of Elec. Workers, 15 F.3d 711, 714 (7th Cir. 1994) (citations omitted), we find that plaintiffs have not established that IUOE breached Article VI section 2. While Hanley's response was non-responsive to the question asked, it was not incorrect and, therefore, not unreasonable. Further, Hanley cannot be said to have breached the constitution, as nothing in section 2 obligated Hanley to interpret the constitution on demand. Rather, as Article VI(S) explicitly states, the General President "shall be vested with unlimited discretion in the application and administration of his powers and duties."

Next, plaintiffs claim that IUOE violated Article VI(3), which gives the General President the authority to provide "international supervision" in the form of a trusteeship in the event of a local's misconduct, when Hanley declined to intervene

in the dispute between plaintiffs and Local 912. The district court determined that plaintiffs waived this claim during plaintiffs' argument on this issue, and we agree.[8] Further, even if the argument was properly before this court, it would fail, as Hanley's response was not unreasonable.

Finally, plaintiffs claim that the IUOE breached its duty of fair representation as embodied in Article VI(5) of the IUOE constitution. Contrary to plaintiffs' position, however, a union's duty of fair representation does not arise from the provisions of a union's constitution, but from the unions' exclusive authority under the NLRA to represent all employees in a bargaining unit. Chauffeurs, Teamsters & Helpers Local No. 391 v. Terry, 494 U.S. 558, 563 (1990).

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[8]Plaintiffs also contend that IUOE violated Article VI, section (5). Plaintiffs completely failed to pursue this claim below, however, and we consider it waived.

Local 912, not IUOE, is the exclusive bargaining representative of plaintiffs and, therefore, Local 912 alone owes plaintiffs a duty of fair representation.

F) Exclusion of the Internal Memorandum from Evidence.

Plaintiffs challenge the district court's exclusion from evidence of an internal memorandum which was written by an employee of R-P and authenticated by stipulation of the parties. While we review evidentiary rulings for an abuse of discretion, reversal is appropriate only when we find that such abuse of discretion "has caused more than harmless error. " Cooley v. Carmine Cinemas, Inc., 25 F.3d 1325, 1330 (6th Cir. 1994)(citations omitted).

The district court did not abuse its discretion in excluding the evidence in question. Plaintiffs attempted to introduce the document through a witness with no

personal knowledge of the documents or the contents contained therein. This clearly violates Fed. R. Evid. 602's mandate that "[a] witness may not testify to a matter unless evidence is introduced sufficient to support a finding that the witness has personal knowledge of the matter." Second, any error was harmless. Plaintiffs intended to use the memorandum to show what R-P knew of its obligations under the cross-bumping agreement, information that would be relevant only to plaintiffs' conspiracy or hybrid § 301 claim. Given the problems inherent with both claims, we find that this evidence, even if admitted, would not have warranted a different result.

AFFIRMED.

CONTIE, J., concurring. I concur. In regard to issue IIB, I feel it is necessary to point out that the union was responsible for strongly encouraging the adoption of the cross-bumping agreement by R-P even though as the majority states, it knew that R-P's "hands would be tied" in an effort to enforce the agreement. The union then refused to pursue a grievance in order to enforce the agreement because it knew such an effort would be futile. I believe R-P and the union shared responsibility for the adoption of an unenforceable agreement in the event of separate ownership of the two plants and in these circumstances, R-P had a valid defense of impossibility. Therefore, I do not believe the district court was in error and would affirm on this basis.

IN THE UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF TENNESSEE
COLUMBIA DIVISION

ALBERT AKINS, et al.	)	
	)	
v.	)	No. 1-91-0134
	)	Judge Higgins
ICI AMERICAS INC., et al.	)	

MEMORANDUM

The Court has before it the joint motion (filed February 14, 1992; Docket Entry No. 51) of defendants Rhone-Poulenc, Inc. (R-P Inc.) and Rhone-Poulenc Basic Chemicals Company (R-P Basic) to dismiss or for summary judgment, the motion (filed September 19, 1992; Docket Entry No. 133) of defendant ICI Americas, Inc. (ICIA) for summary judgment,[1] the motion (filed September 19, 1992; Docket Entry No. 138) of defendant Local Union No. 912, International Union of Operating Engineers (Local 912) for summary judgment, and the motion (filed October 2, 1992; Docket Entry No. 149) of

[1]Defendant ICI Americas, Inc. changed its name to Zeneca, Inc. after it filed its motion for summary judgment. For the sake of clarity, the Court continues to refer to this defendant by its former name.

defendant International Union of Operating Engineers (IUOE) for summary judgment.

Also before the Court is the plaintiffs' request to try this action before a jury. See amended complaint (filed January 23, 1992; Docket Entry No. 30) at 10.

For the reasons set forth below, the motion of defendant ICIA shall be granted in full. The motions of the other defendants shall be granted in part and denied in part. The plaintiffs' jury demand shall be granted.

I.

This action is brought by sixty-eight chemical workers from Mt. Pleasant, Tennessee, some of whom have been laid off and some of whom are facing layoffs. In 1982, their former employer promised them that they could transfer to another plant if they were laid off at their own workplace. However, by the time layoffs were announced, the employer no longer owned the plant where the plaintiffs

worked or the other plant to which it had promised them the transfer. Thus, to get what they believed they are due, the plaintiffs have brought this action against their former employer, the corporations that bought the former employer's plants, and their labor union.

For many years, Stauffer Chemical Company owned and operated two chemical plants in Mt. Pleasant, Tennessee. One, which is commonly called the "furnace plant," produced phosphorous. The other, which is commonly called the "organic plant," produced herbicides and pesticides.

Workers at both plants were represented by Local 912. These workers constituted a single collective bargaining unit with one common seniority list. One collective bargaining agreement governed the terms of employment for both plants.

In 1982, Stauffer Chemical Company proposed splitting the single collective bargaining unit into two separate units. Local 912 strongly objected t the proposal. However, after negotiations, the parties reached an agreement, Local 912 consented to divide the furnace plant and the organic plant employees into separate bargaining units, provided that Stauffer Chemical Company would permit workers at one plant to "cross-bump" to the other plant. This meant that in the event of layoffs at one plant, a senior employee from that plant could transfer to the other plant and displace a junior employee. The parties memorialized their bargain in a memorandum of agreement, commonly referred to as the "cross-bumping agreement."[2]

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[2]The cross-bumping agreement, which lies at the core of this case, is set forth below in its entirety:

Memorandum of Agreement

Local Union No. 912, International Union of Operating Engineers and Stauffer Chemical Company for its Phosphorus Products Plant (Furnace) and its

At roughly the same time that they

Intermediate Agricultural Chemicals Plant (Organic), both located at Mt. Pleasant, Tennessee do hereby agree that:

1. Employees hired prior to September 11, 1982 may exercise layoff rights as described below with the exception of current furnace plant employees who do not have the seniority to displace current employees at the organic plant.

2. Employees shall first exhaust their rights under the layoff procedures described in the collective bargaining agreement covering the plant to which they are assigned.

3. Employees of either plant covered by this Memorandum of Agreement who are to be laid off from their plant may then displace junior employees in the other plant provided that:

a. the employee displaced shall be the junior employee in the classification.

b. The employee must qualify for such classification after a reasonable training period at the organic plant or a period of fifteen (15) working days or less at the furnace plant. If the employee fails to qualify, he will not be allowed to make further choices of jobs but rather will be laid off.

4. Employees who elect to move from one plant to another will become an employee of the plant to which they have moved and will have no further rights to return to the other plant.

5. Employees who are given the opportunity to exercise their rights under this Memorandum of Agreement and who decline to do so shall forfeit future rights under this Agreement. (Ex. P-28.)

executed the cross-bumping agreement, Local 912 and Stauffer Chemical Company entered into two new collective bargaining agreements: one for the furnace plant and the other for the organic plant.[3] Each collective bargaining agreement provided that the cross-bumping agreement "shall be considered as supplemental to the Collective bargaining Agreement between the parties . . . and shall remain in full force and effect during the period of such Collective Bargaining Agreement unless modified by the parties in writing." Appendix (filed September 18, 1982; Docket Entry No. 136) to ICIA's motion for summary judgment at 74-75, 320. These collective bargaining agreements remained in effect for three years.

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[3]The dates of the cross-bumping agreement and the collective bargaining agreements are anomalous. The collective bargaining agreements, which are dated September 11, 1982, refer to the cross-bumping agreement as a memorandum of agreement dated September 13, 1982. In fact, the cross-bumping agreement does not bear any date.

In 1985, upon expiration of the 1982 collective bargaining agreements, Local 912 and Stauffer Chemical Company negotiated new three-year collective bargaining agreements for the two plants. Like their predecessors, the new collective bargaining agreements provided that the cross-bumping agreement was considered supplemental and that it would remain in effect for the duration of the current collective bargaining agreements.

In July 1987, prior to the expiration of the 1985 collective bargaining agreements, various corporate affiliates of a multinational corporation, Imperial Chemical Industries, P.L.C., purchased Stauffer Chemical Company. One of these affiliates retained the organic plant and merged into defendant ICIA. The other affiliates operated Stauffer's other facilities for a short period before selling them to unrelated companies near the end of 1987. Defendant R-P Inc.

purchased the furnace plant in December, 1987. R-P Inc. also acquired all of the stock of Stauffer Chemical Company sometime in 1987.[4]

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[4]The parties have stipulated that R-P Inc. purchased all of the Stauffer Chemical Company stock sometime during 1987. Agreed stipulations (filed November 9, 1992; Docket Entry No. 162) ¶¶ 41-42. The parties have stipulated further that Stauffer Chemical Company changed its name to "Stauffer Chemical Company Division of Rhone-Poulenc, Inc." in 1988 and that entity changed its name to "Rhone-Poulenc Basic Chemicals Company" in 1989. Id. at ¶¶ 43-44.

The R-P defendants contend that there is no longer an entity called Stauffer Chemical Company. R-P Inc. and R-P Basic's opposition (filed February; 18, 1992; Docket Entry No. 55) to application for default at 1. Nevertheless, the record is not entirely consistent with this contention.

On October 23, 1987, Stauffer Chemical Company applied to the Secretary of State of Tennessee for a certificate of withdrawal from Tennessee. In accordance with Tenn. Code Ann. Section 48-25-201(b), it is consented to service of process on the Secretary of State for actions arising while it was authorized to transact business in Tennessee, and it listed "ICI Americas Inc., . . . Wilmington, Delaware" as its forward address. See exhibit No. 1 to plaintiffs' response (filed January 13, 1992; Docket Entry No. 24) to motion to quash. It has never notified the Secretary of State that its address has changed, although Tenn. Code Ann. Section 48-25-201 requires it to do so.

On February 22, 1988, an entity called Stauffer Chemical Company Division of Rhone-Poulenc applied to the Secretary of State of Tennessee for a certificate of authority to transact business in Tennessee. On the application, it indicated that its date of incorporation was July 15, 1987. Exhibit No. 1 to plaintiffs' reply (filed February 18, 1992; Docket Entry No. 56) to opposition to application for default judgment. On October 25, 1989, this entity applied to the Secretary of State to amend its certificate to reflect its new name as "Rhone Poulenc Basic Chemicals Co." Again, it listed its date of incorporation as July 15, 1987. Id.

ICIA and R-P Basic, a subsidiary of R-P Inc., continued to operate the organic and the furnace plants under the terms of the collective bargaining agreements that Stauffer Chemical Company had negotiated in 1985. However, upon the expiration of those agreements in 1988, each of the new owners

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These facts indicate that Stauffer Chemical Company and R-P Basic are separate entities, the latter being incorporated on July 15, 1987. The plaintiffs have properly served process on defendant Stauffer Chemical Company by executing service of process on the Secretary of State of Tennessee in accordance with Tenn. Code Ann. Section 48-55-104. Unless defendant Stauffer Chemical Company answers the amended complaint within fifteen days of the entry of the order accompanying this memorandum, the Court will instruct the Clerk to do her duty and enter default in accordance with Federal Rule of Civil Procedure No. 55(a).

The Court also notes that on March 5, 1990, an entity called Stauffer Chemical Company, listing its address as "ICI Americas Inc. . . . Wilmington, Delaware" and its date of incorporation as July 14, 1987, applied to the Secretary of State for a certificate of authority to transact business in Tennessee. See exhibit No. 2 to plaintiff's response (filed January 13, 1992; Docket Entry No. 24) to motion to quash. Then, on March 13, 1990, the same entity filed an application of withdrawal. Id. Although the filing of the application for withdrawal only eight days after the first application suggests that the first application had been filed in error, the matter is perplexing. B.W. Bowman, the corporate secretary, signed both the application to transact business and the application to withdrawal on the same day, February 8, 1990. Thus, it appears that the documents were advertently filed to authorize an entity called Stauffer Chemical Company to transact business in Tennessee for a short period in early 1990.

negotiated its own collective bargaining agreement with Local 912.

During the negotiations, ICIA and R-P Basic tried to get Local 912 to agree to delete all references to the cross-bumping agreement. However, the union refused. The 1988 collective bargaining agreements for both companies, like the previous agreements negotiated by Stauffer Chemical Company, stated that the cross-bumping agreement was considered supplemental and that it would remain in effect for the duration of the collective bargaining agreements. Appendix (filled September 18, 1992; Docket Entry No. 136) to ICIA's motion for summary judgment at 219, 361. ICIA's collective bargaining agreement remained in effect until June 11, 1991. R-P Basic's collective bargaining agreement remained in effect until August 15, 1991. In addition, R-P Basic's agreement incorporated by reference a new memorandum of

agreement, dated October 13, 1988, which purportedly clarified the company's obligations with respect to the cross-bumping agreement.[5]

In June, 1990, R-P Basic announced that it was going to close the furnace plant and that layoffs were expected to begin in February, 1991. Workers at the organic plant, who feared being displaced by senior workers from the furnace plant, began to regard the cross-bumping agreement with disdain. Meanwhile, workers at the furnace plant were developing a newfound appreciation for the same agreement. Local 912 was caught in the middle.

Anticipating that the organic plant employees and ICIA would seek to rescind the

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[5]This memorandum of agreement stated: "The Company will have fulfilled all its obligations under the Collective Bargaining Agreement when its employees have been [laid] off under Article VII, Seniority, or when its employees have been [laid] off under the terms of the [cross-bumping agreement] as it pertains to I.C.I.[A.] (Organic Plant)." Appendix A filed February 14, 1992; Docket Entry No. 54) to motion for summary judgment of R-P Basic and R-P Inc., exhibit No. 1 at 5.

cross-bumping agreement, Local 912's business manager, James Kincaid, sought the advice of the international union. In a letter dated June 26, 1990, Mr. Kincaid wrote to Frank Hanley, General President of the IUOE, and explained his dilemma in great detail. Plaintiffs' exhibit No. 7 (filed March 13, 1992; Docket Entry No. 66). Specifically, he inquired whether Section XXIV(11)(e) of the IUOE constitution, which requires that proposed modifications to collective bargaining agreements be "approved by the membership affected," would permit the organic plant bargaining unit to rescind the cross-bumping agreement without the consent of the furnace plant bargaining unit. President Hanley's reply did not answer Mr. Kincade's question. Plaintiffs' exhibit No. 8 (filed March 13, 1992; Docket Entry No. 66). President Hanley merely stated that the union members' rights were already governed by the

cross-bumping agreement. Therefore, he concluded, Section XXIV(11)(e), which applied only to "proposed" modifications of collective bargaining agreements, was inapplicable.

On October 16, 1990, pursuant to the advice of its local counsel, Local 912 filed a declaratory judgment action in this Court against ICIA and RP-Basic. The complaint in that action asked this Court, in part, to "declare whether employees from the Rhone-Poulenc Furnace Plant have the right to bump employees in the ICI[A] organic plant pursuant to the [cross-bumping] agreement." Plaintiff's exhibit No. 36 (filed October 13, 1992; Docket Entry No. 160) ¶ 12.

After the commencement of the declaratory judgment action, R-P Basic indicated for the first time that the layoffs, which had been scheduled to begin in February, 1991, might be delayed. In fact, the first layoffs did not begin until July, 1991.

As the expiration of the organic plant collective bargaining agreement approached, the furnace plant employees became increasingly anxious that their colleagues at the organic plant would delete the cross-bumping agreement from their new collective bargaining agreement with ICIA. Nevertheless, Mr. Kincade, assured them that nothing that ICIA might do could affect their right to transfer pursuant to the cross-bumping agreement.

On June 1, 1991, ICIA and Local 912 entered into a new collective bargaining agreement. As the furnace plant employees had feared, the parties deleted all references to the cross-bumping agreement.

At the next meeting of the furnace plant bargaining unit, Mr. Kincade spoke about the effect of the new organic plant collective bargaining agreement. Mr. Kincaid told the furnace plant employees that, after discussing

the matter with Local 912's attorney, he had changed his mind about ICIA's ability to affect their transfer rights. He now believed that deleting the cross-bumping agreement from the new organic plant collective bargaining agreement had foreclosed their right to transfer to the organic plant. He also told them that Local 912 had dismissed the declaratory judgment action as moot.

Understandably, the furnace plant employees were displeased with Local 912. Mr. Kincade previously had told them that Local 912 could not affect their transfer rights through its negotiations on behalf of the organic plant bargaining unit. Now Mr. Kincade had reversed himself. Moreover, he asserted that Local 912 had just surrendered their transfer rights on the eve of layoffs at the furnace plant.

On July 10, 1991 several of the plaintiffs wrote directly to Frank Hanley,

General President of IUOE. Plaintiffs' exhibit No. 9 (filed March 13, 1992; Docket Entry No. 66). They explained the conflict of interest that had developed and concluded as follows: "We would appreciate anything you could do for us, as our union seems to be working against our best interest." President Hanley responded by letter dated August 5, 1991 that the matter was purely local and did not concern the IUOE. Plaintiffs' exhibit No. 44 (filed October 13, 1992; Docket Entry No. 160).

Layoffs at the furnace plant began in July, 1991. Pursuant to a severance agreement previously negotiated between Local 912 and R-

P Basic, many of the laid-off workers accepted severance pay and other severance benefits. As a precondition to receiving such benefits, each employee had to sign a waiver that released R-P Basic from all pending and future obligations to the employee. Appendix (filed September 18, 1992; Docket Entry No. 136) to ICIA's motion for summary judgment at 231.

In August, 1991, Mr. Kincade assisted some of the plaintiffs in filing a grievance with R-P Basic. Appendix A (filed February 14, 1992; Docket Entry No. 54) to motion for summary judgment of R-P Basic and R-P Inc., exhibit No. 5. The grievants demanded that they be transferred to the organic plant and that they be made whole for any losses they had sustained. R-P Basic denied the grievance, insisting that it had fulfilled all

of its obligations under the cross-bumping agreement by permitting its employees to transfer to ICIA. Id. R-P Basic maintained that it could not force ICIA to accept them. To facilitate the transfers, R-P Basic circulated a form on which laid-off employees could indicate whether they desired to transfer. The company eventually forwarded the forms to ICIA, but ICIA returned them. Plaintiffs' exhibit No. 47 (filed October 13, 1992; Docket Entry No. 160).

Some of the plaintiffs also attempted on their own to file a grievance at ICIA. However, ICIA refused to process it on the grounds that the grievants were not ICIA employees. Plaintiffs' exhibit No. 5 (filed October 13, 1992; Docket Entry No. 160).

Feeling betrayed by their union and the corporations that owned the two plants, the plaintiffs brought this action in November, 1991. They allege that the corporate

defendants have breached the cross-bumping agreement and their collective bargaining agreements in violation of Section 301 of the Labor Management Relations Act (LMRA), 19 U.S.C. § 185. The plaintiffs also allege that the union defendants violated LMRA Section 301 by breaching the union constitution and that they violated Section 101 of the Labor-Management Reporting and Disclosure Act (LMRDA), 29 U.S.C. § 411. In addition, the plaintiffs allege that all of the defendants are liable under the laws of the State of Tennessee for tortiously interfering with the plaintiffs' contract rights and for conspiring to do the same.

The plaintiffs seek monetary, injunctive, and declaratory relieve.

Jurisdiction is based on 28 U.S.C. § 1331.

II.

Under Federal Rule of Civil Procedure 56 "[a] court may grant summary judgment only if there are no issues of material fact in dispute and the moving party is entitled to judgment as a matter of law." Davidson & Jones Development Company v. Elmore Development Co., Inc., 921 F.2d 1343, 1349 (6th Cir. 1991). An issue of material fact is one which would enable a reasonable jury to find in favor of the non-moving party in accordance with the substantive law of the suit. See Anderson v. Liberty Lobby, Inc., 447 U.S. 242, 248, 249, 252, 106 S.Ct. 2505, 2510, 2512, 91 L.Ed.2d 202, 211, 212, 214 (1986). "Only disputes over facts that might affect the outcome of the suit under the governing law will properly preclude the entry of summary judgment." Id. at 248, 106 S.Ct. at 2510, 91 L.Ed.2d at 211. Furthermore, when considering a motion for summary judgment,

all "'inferences to be drawn from the underlying facts contained in [affidavits, pleadings, depositions, answers to interrogatories, and admissions] must be viewed in the light most favorable to the party opposing the motion.'" Davidson & Jones Development, 921 F.2d at 1349 (quoting United States v. Diebold, 369 U.S. 654, 655, 82 S.Ct. 993, 994, 8 L.Ed.2d 176 (1962)).

However, "[t]he mere existence of a scintilla of evidence in support of the plaintiff's position will be insufficient [to defeat a motion for summary judgment]; there must be evidence on which the jury could reasonably find for the plaintiff." Liberty Lobby, 477 U.S. at 252, 106 S.Ct. at 2512, 91 L.Ed.2d at 214.[6] Moreover, once a motion for

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[6] See also City Communications, Inc. v. City of Detroit, 888 F.2d 1081, 1085 (6th Cir. 1989) ("'the mere existence of some alleged factual dispute between the parties will not defeat an otherwise properly supported motion for summary judgment; the requirement is that there be no genuine issue of material fact.'") (quoting Liberty Lobby, 477 U.S. at 247-48, 106 S.Ct. at 2510, 91 L.Ed.2d at 221; emphasis in original).

summary judgment has been made, "the non-moving party bears the responsibility to demonstrate that summary judgment is inappropriate under Rule 56(e)." Davidson & Jones Development, 921 F.2d at 1349. In other words, when a party makes a motion for summary judgment, it has "challenge[d] the opposing party to 'put up or shut up' on a critical issue. After being afforded sufficient time for discovery, as required by Federal Rule of Civil Procedure 56(f), if the respondent [does] not 'put up,' summary judgment is proper." Street v. J.C. Bradford & Co., 886 F.2d 1472, 1478 (6th Cir. 1989). Further,

> [a] district court is not required to speculate on which portion of the record the nonmoving party relies, nor is it obligated to wade through and search the entire record for some specific facts that might support the nonmoving party's claim. Rule 56 contemplates a limited marshalling of evidence by the nonmoving party sufficient to establish a genuine issue of material fact for trial.

InterRoyal Corporation v. Sponseller, 889 F.2d 108, 111 (6th Cir.), cert. denied, 494 U.S. 1091, 110 S.Ct. 1839, 108 L.Ed.2d 967 (1990).

A. LMRA Section 301 Claims.

Section 301 of the Labor Management Relations Act creates a cause of action for "violation[s] of contracts between employer and a labor organization representing employees . . . , or between any such labor organizations." 29 U.S.C. § 185(a).

In the instant action, the plaintiffs allege that the corporate and the union defendants violated Section 301 by breaching the cross-bumping agreement, as well as the various collective bargaining agreements that incorporated it, all of those agreements being "contracts between an employer and a labor organization representing employees." The plaintiffs further allege that the union defendants violated Section 301 by breaching the union constitution, which is a contract

"between . . . labor organizations." Below, the Court separately treats the claims against each defendant.

1. **R-P Basic and R-P Inc.**

The plaintiffs have come forward with sufficient evidence to defeat the R-P defendants' motion for summary judgment on the claim that they breached the cross-bumping agreement and the 1988 furnace plant collective bargaining agreement.[7] The cross-bumping agreement unambiguously provides that senior employees who are laid off at the furnace plant may transfer to the organic plant. The 1988 collective bargaining agreement, to which R-P Basic is a signatory, explicitly incorporates the cross-bumping agreement.

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[7]The plaintiffs also allege that the R-P defendants breached the 1982 and 1985 collective bargaining agreements. Those agreements are expired and superseded by the 1988 bargaining agreement. The plaintiffs' claims that the R-P defendants breached them in 1991 is meritless. Accordingly, the Court shall enter summary judgment for the defendants on those claims.

The contention of the R-P defendants that merely permitting the plaintiffs to transfer to the organic plant satisfies their obligations is fanciful. Granted, they may have difficulty forcing ICIA to give the plaintiffs jobs at the organic plant, especially since the cross-bumping agreement has been deleted from the organic plant collective bargaining agreement, but the R-P defendants have only themselves to blame. Before their purchase of the Stauffer Chemical Company stock in 1987, ordinary due diligence should have made them aware of the obligations of the corporation they were purchasing.[8] It is a basic principle of corporate law that "[i]n case of merger of one corporation into another, where one of the corporations ceases to exist and the other corporation continues

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[8]The R-P defendants readily admit that R-P Basic is the "successor in interest" to Stauffer Chemical Company. E.g., opposition (filed February 18, 1991; Docket Entry No. 55) by R-P Basic and R-P Inc. to application of default at 1.

in existence, the latter corporation is liable for the debts, contracts and torts of the former." 15 William M. Fletcher, Fletcher Cyclopedia of the Law of Private Corporations § 7121 (perm ed. rev. vol. 1990). Stauffer Chemical Company had promised the plaintiffs jobs at the organic plant, and when the R-P defendants bought Stauffer Chemical Company, they assumed that obligation. Prior to the purchase of Stauffer Chemical Company, the R-P defendants could have contracted with ICIA to reserve jobs at the organic plant or they could have contracted with Local 912 to surrender the plaintiffs' rights to transfer. However, they did neither. Moreover, in 1988 R-P Basic explicitly adopted the cross-bumping agreement by incorporating it into its own collective bargaining agreements for the furnace plant. The fact that ICIA has refused to accept the laid-off furnace plant employees does not relieve R-P Basic of its own

independent promise to them. Pacta sunt servanda -- contracts are to be kept. See generally Restatement (Second) of Contracts, Introductory Note to ch. 11; John D. Calamari & Joseph M. Perillo, Contracts 536 (3d ed. 1987) (Even though an equity court will not grant specific performance when a promise is impossible to perform, the breaching party is still liable in damages.).

Nor does the October 13, 1988, memorandum of agreement[9] clearly abrogate the transfer rights of the plaintiffs. It merely says that R-P Basic may lay off employees by seniority "or" under the terms of the cross-bumping agreement. However, it is ambiguous as to whether employees who are covered by the cross-bumping agreement may be laid off by seniority. A logical reading is that employees who are covered by the cross-bumping agreement are to be laid off in accordance

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[9] Supra note 5.

with that agreement (in other words, transferred to the organic plant) and that other employees are to be laid off by seniority. Furthermore, the plaintiffs have submitted ample extrinsic evidence suggesting that this interpretation is correct.[10]

Even though the R-P defendants have not overcome, at this stage, the plaintiffs' evidence showing that they breached the cross-bumping agreement and the 1988 collective bargaining agreement, they would still be entitled to summary judgment if they could demonstrate that Local 912 did not breach its "duty of fair representation" in refusing to

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[10]The plaintiffs' evidence includes the affidavit of a member of the employees' 1988 negotiating committee and an alternative version of the October 13, 1988, memorandum of agreement that clearly sets out the interpretation urged by the R-P defendants but was rejected by the employee bargaining unit. Plaintiffs' exhibit Nos. 1 & 3 (filed March 13, 1992; Docket Entry No. 66).

The R-P defendants argue that these documents are inadmissible parole evidence. They are not. The parole evidence rule does not forbid the admission of extrinsic evidence as an aid to interpretation of an ambiguous contract term. See generally John D. Calamari & Joseph M. Perillo, Contracts §§ 3-9 to 3-15 (1987).

pursue their grievance against R-P Basic. See DelCostello v. International Bhd. of Teamsters, 462 U.S. 151, 164 n.14, 103 S.Ct. 2281, 2290, n.14, 76 L.Ed.2d 476, 489 n.14 (1983). The 1988 collective bargaining agreement between R-P Basic and Local 912 provides an elaborate procedure for the resolution of disputes. Appendix A (filed February 14, 1992; Docket Entry No. 54) to motion for summary judgment of R-P Basic and R-P Inc., exhibit No. 2, Article IX. The Supreme Court has instructed that when collective bargaining agreements contain this sort of internal dispute resolution mechanism, employees may not "sidestep" it by bringing a Section 301 action against their employer. Hines v. Anchor Motor Freight, Inc., 424 U.S. 554, 563, 96 S.Ct. 1048, 1055, 47 L.Ed.2d 231, 241 (1976). Rather, an aggrieved employee must first exhaust whatever dispute resolution procedures are established by the collective

bargaining agreement. Vaca v. Sipes, 386 U.S. 171, 184, 87 S.Ct. 903, 914, 17 L.Ed.2d 842, 854 (1967). When those procedures provide that the employee's union has the exclusive authority to process grievances, the employee must defer to this union's efforts on his behalf. Id. Unless the employee demonstrates that his union breached its duty of fair representation in handling his grievance, the employee may not bring a Section 301 action against his employer. Id. at 186, 87 S.Ct. at 914-15, 17 L.Ed.2d at 855. The employee must prove that the union breached its duty of fair representation and that the employer breached the collective bargaining agreement before the employee may recover from either of them. Hines, 424 U.S. at 570-571, 96 S.Ct. at 1059, 47 L.Ed.2d at 245; Bagsby v. Lewis Bros., 820 F.2d 799, 801 (6th Cir. 1987). Accordingly, this form of action is often called a "hybrid Section 301/duty of fair representation

claim."[11] DelCostello, 462 U.S. at 165, 103 S.Ct. at 2291, 76 L.Ed.2d at 489.

In Part II.B.1 of this memorandum the Court explains why Local 912 is not entitled to summary judgment on the claim that it breached its duty of fair representation in refusing to process the plaintiff's grievance against R-P Basic. Accordingly, R-P Basic may not escape liability from the hybrid claim against it on that basis.

Furthermore, the R-P defendants' argument that the plaintiffs failed to exhaust internal union procedures to force Local 912 to process their grievance, see Willets v. Ford Motor Company, 583 F.2d 852, 855-56 (6th Cir. 1978), is adequately rebutted by the plaintiffs' evidence. This evidence includes an affidavit

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[11]Some of the defendants have asserted that the plaintiffs' hybrid claim is barred by the six-month statute of limitations. See DelCostello, 462 U.S. 151, 155, 103 S.Ct. 2281, 2285, 76 L.Ed.2d 476, 483. The Court disagrees. No cause of action accrued before the first plaintiffs were laid off in July, 1991. The complaint was timely filed on November 14, 1991.

of one of the plaintiffs in which he avers that there are no such procedures. Plaintiffs' exhibit No. 1 (filed March 13, 1992; Docket Entry No. 66) at 3-4. See also plaintiffs; exhibit No. 3 (letter from plaintiffs' counsel to Local 912 regarding existence of internal union procedures).

Nevertheless, the Court finds that those plaintiffs who accepted severance pay from R-P Basic in exchange for releasing the company from all obligations to them are bound by their agreement.[12] Each of them received a

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[12]Defendant ICIA alleges that twenty-seven of the plaintiffs signed the release in exchange for severance pay. Memorandum (filed September 18, 1992; Docket Entry No. 134) of the defendant ICIA in support of motion for summary judgment at 65 n.29. Defendant R-P Basic only alleges that twenty-five of the plaintiffs signed releases. memorandum (filed February 14, 1992; Docket Entry No. 53) of defendants R-P Basic and R-P Inc. in support of motion for summary judgment at 27. The record contains copies of twenty-four releases signed by individual plaintiffs. Appendix (filed September 18, 1992; Docket Entry No. 146) to defendant ICIA's motion for summary judgment at 606-30.

The twenty-four plaintiffs whose signed releases are part of the record are the following: Gene Barker, Tony Brock, William T. Colvert, Robert Gilliam, Danny S. Green, Jerry Hicks, Walter Hudspeth, Mark Hunt, Nadine James, Richard W. James Jr., William L. Jarrett, Terry Jennings, Raymond Neely, Terrance Nevette, Ralph Osborn, David Paley, Michael Pilkinton, Charles S. Robinson Jr.,

severance package that included $6,910.40 to $9,180.00 in cash, depending on the length of employment, and other benefits. In exchange for this severance package, each employee signed a release that was very clear. It said:

> I hereby release the Company from any and all pending and future obligations and liabilities to me arising out of employment with the Company, except for any unemployment compensation or worker's compensation claims that I may make and except as provided under the terms of the Memorandum of Understanding.

Appendix (filed September 18, 1992; Docket Entry No. 136) to ICIA's motion for summary judgment at 606-30. The "Memorandum of Understanding" referred to in the release is the severance agreement negotiated by Local 912 and R-P Basic. Id. at 228. It sets out the various severance benefits and the terms for receiving them, including the requirement

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James R. Scott Jr., Joseph Shyes, Sharon Liles Steiner, William T. Thomason, Robert J. Tidwell, and Geneva Wiggins. Id.

that each employee release R-P Basic from "any and all pending and future obligations and liabilities" as a condition to receiving the severance package. Id. at 229.

Those plaintiffs who accepted the severance package struck a deal with R-P Basic. None has offered to return the severance benefits he received. Now, it is too late to renege. See Cumberland & Ohio Co. v. First Am. Nat. Bank, 936 F.2d 846, 850 (6th Cir. 1991) (Releasor who retains consideration may not later avoid terms of release.).

Nor is there any evidence in the record that any of the plaintiffs who signed the release did not do so knowingly, willingly, or voluntarily. It is difficult to imagine any release having a clearer meaning than the one quoted above. The plaintiffs have attempted to inject some confusion into this otherwise unambiguous release by pointing to a sentence

in the severance agreement that states: "Qualifying for a position at the Organic Plant will make an individual ineligible under this [severance agreement] whereas failure to qualify for a position at the Organic Plant will not make an individual ineligible." Appendix (filed September 18, 1992; Docket Entry No. 136) to ICIA's motion for summary judgment at 230. The plaintiffs argue that this sentence indicates that the release did not cover R-P Basic's obligation to transfer the plaintiffs to the organic plant. The Court, however, concludes that there is no merit to this argument. The release clearly states that it covers "any and all" obligations by R-P Basic. The sentence to which the plaintiffs have referred is not to the contrary. It merely provides that any laid-off furnace plant employee who succeeded in transferring to the organic plant would not be eligible for the severance benefits. The

release did not affect the plaintiffs' claims against ICIA. At the time the plaintiffs signed the release, and even today, they continued to believe that the cross-bumping agreement obligated ICIA to provide them with jobs at the organic plant. It is easily understood that Local 912 and R-P Basic agreed that those employees who succeeded in transferring should not receive the same severance benefits as their colleagues who were put out of work by the layoffs.

The plaintiffs' other arguments -- that the releases we procured by fraud and that the consideration was inadequate -- are also without merit. The "fraud" alleged by the plaintiffs is that R-P Basic told the plaintiffs, before it asked them to sign the releases, that it was not obligated to provide transfers under the cross-bumping agreement. However, taking a position on a disputed legal claim is not the same as misrepresenting a

material fact. Not only is it short of fraud, but it is difficult to imagine a situation in which a party seeking a release from a contested legal claim would actually concede the claim beforehand. Likewise, the argument that the consideration given to the plaintiffs was inadequate because it was no greater than that given to other employees is without basis in the law. Courts do not inquire into the adequacy of consideration, and any consideration, however slight, is legally sufficient to support a promise. E.G., Sambo's Restaurants v. City of Ann Arbor, 473 F. Supp. 41, 45 (E.D. Mich. 1979), Rev'd on other grounds, 663 F.2d 686 (6th Cir. 1981).

Those plaintiffs who accepted severance benefits in exchange for releasing R-P Basic from its obligations to them are bound by their agreement. Therefore, the Court shall enter summary judgment for defendants R-P Basic and R-P Inc. on the Section 301 claims of all plaintiffs who signed the release and accepted severance pay.

2. **ICIA**

The Court concludes that ICIA is entitled to summary judgment on the plaintiffs' Section 301 claims. ICIA ended any obligation it may have had to the plaintiffs when it deleted the cross-bumping agreement from the 1991 organic plant collective bargaining agreement.

There is a strong argument to be made that, in 1987, ICIA assumed the obligations of Stauffer Chemical Company's organic plant collective bargaining agreement because ICIA continued to employ the same workforce that

was already in place. See Howard Johnson Co. v. Detroit Joint Bd., Hotel & Restaurant Employees, 417 U.S. 249, 263, 94 S.Ct. 2236, 2244, 41 L.Ed.2d 46, 57 (1974). Furthermore, in 1988, ICIA entered its own organic plant bargaining agreement, which explicitly incorporated the cross-bumping agreement. However, when the 1988 agreement expired, ICIA did not renew the provisions regarding the cross-bumping agreement. To the contrary, the 1991 organic plant collective bargaining agreement, which provided that it "shall supersede and cancel the previous Agreement between the parties" contained no reference at all to the cross-bumping agreement. Appendix (filed September 18, 1992; Docket Entry No. 136) to ICIA's motion to dismiss at 273.

Therefore, if the plaintiffs have any contract rights that are enforceable against ICIA, those rights must be based on either the furnace plant collective bargaining agreement

or the cross-bumping agreement itself. But the plaintiffs face an insurmountable problem in basing a claim on either of those agreements: ICIA is a party to neither one.

The plaintiffs' claim that ICIA breached the furnace plant collective bargaining agreement is frivolous. That agreement is strictly between Local 912 and R-P Basic, and it does not create any liability for ICIA.

Likewise, the cross-bumping agreement is between Local 912 and Stauffer Chemical Company. When ICIA deleted any reference to it in the 1991 organic plant collective bargaining agreement, ICIA ended any obligation it may; have previously assumed.

The plaintiffs have argued at great length that their rights under the cross-bumping agreement "vested" in 1982, when they agreed to become part of a separate bargaining unit for the furnace plant. Cf. International Union, United Automobile Workers v. Yardman,

Inc., 716 F.2d 1476, 1479-1483 (6th Cir. 1983) (recognizing the vesting of retiree benefits upon retirement). Whether or not this is true or not is irrelevant to the plaintiffs' claim against ICIA. If the plaintiffs' rights did vest, they vested against Stauffer Chemical Company; and its successors in interest, not ICIA. The plaintiffs would like the Court to treat their transfer rights as though they were covenants that "run with the land" and bind all successive owners of the organic plant. But the common law of real covenants is another story, albeit an interesting one, having nothing to do with this case. The obligation that Stauffer Chemical Company undertook in entering the cross-bumping agreement was purely personal, and it rested only with Stauffer Chemical Company and its successors in interest.

3. **Local 912**

In Wooddell v. International Bhd. of Elec. Workers, 502 U.S. ___, 112 S.Ct. 494, 116 L.Ed.2d 419 (1991), the Supreme Court held that a union member could maintain an action under LMRA Section 301 for breach of the union constitution. Relying on Wooddell, the plaintiffs claim that Local 912 violated the IUOE constitution in three respects: (1) by causing a "rupture of relations" between the plaintiffs and R-P basic; (2) by failing to live up to the duty of fair representation; and (3) by excluding the plaintiffs from voting on whether to delete the cross-bumping agreement from the 1991 organic plant collective bargaining agreement.[13] See plaintiff's memorandum in opposition to

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[13]The amended complaint further claims that Local 912 breached the cross-bumping agreement, as well as the organic and furnace plant collective bargaining agreements. However, the plaintiffs have failed to articulate any theory on which these claims are based, nor has the Court been able to divine one. Accordingly, the Court shall enter summary judgment on these claims in favor of Local 912.

summary judgment (filed October 13, 1992; Docket Entry No. 158) at 12, 27-28.

As the basis for the first allegation, the plaintiff cites Section XXIV(11)(c) of the IUOE Constitution, which prohibits local unions from causing a "rupture of relations existing under a legal contract with any employer." Plaintiffs' exhibit No. 51 (filed October 13, 1992; Docket Entry No. 160) at 104. However, a quick reading of this provision in its proper context shows that it has nothing to do with the plaintiffs' case. Rather, it is a prohibition against local unions organizing walkouts or other disruptions, except in appropriate circumstances.

The second allegation -- that Local 912 violated the IUOE constitution by not living up to its duty of fair representation -- is also unsupported by the test of the union constitution. The plaintiffs have pointed to

no provision, nor has the Court been able to locate one, which requires that IUOE locals live up to a duty of fair representation.

The plaintiffs' third allegation does have a basis in the union constitution, and they have submitted ample evidence to support it. Section XXIV(11)(e) provides that "proposed collective bargaining agreements and modifications thereof . . . shall not be executed until they have been presented at the next membership meeting . . . and have been approved by the membership affected." Plaintiffs' exhibit No. 51 (filed October 13, 1992; Docket Entry No. 160) at 105 (emphasis added). Local 912 has told the plaintiffs and this Court that deleting the cross-bumping agreement from the organic plant collective bargaining agreement foreclosed the plaintiffs' right to transfer. Furthermore, Local 912 refused to process the plaintiffs' grievance against R-P Basic on that basis.

Undeniably, the plaintiffs, who are members of Local 912, were "affected' by the change in the organic plant collective bargaining agreement. They have submitted evidence that they never approved that change. Therefore, the Court shall not grant summary judgment on the plaintiffs' claim that Local 912 breached Section XXIV(11)(e) of the IUOE constitution. See Ackley v. Western Conference of Teamsters, 958 F.2d 1463, 1477 (9th Cir. 1992) (recognizing Section 301 cause of action against union that denied plaintiffs' right to vote on proposed contract in violation of union constitution).

4. IUOE

Also relying on Wooddell v. International Bhd. of Elec. Workers, supra, the plaintiffs allege that IUOE has violated the union constitution.[14] In particular, they cite

[14]The plaintiffs also claim that IUOE breached the cross-bumping agreement and the furnace pant and organic plant collective bargaining agreements. However, the plaintiffs have not explained how IUOE could have

General President Frank Hanley's response to the letter from James Kincade requesting an interpretation of the union constitution, and they cite IUOE's failure to intervene in Local 912's affairs after learning of the conflict of interest between the furnace and organic plant bargaining units. See plaintiffs' memorandum in opposition to summary judgment (filed October 13, 1992; Docket Entry No. 158) at 10-11, 26.

Section VI(2) of the IUOE constitution provides that "[the general president] shall also be empowered to interpret the provisions of the Constitution and decide questions of law arising thereunder." Plaintiffs' exhibit No. 51 (filed October 13, 1992; Docket Entry No. 160) at 21. Referring specifically to this provision, James Kincade wrote to General President Hanley on June 26, 1990, and

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breached these agreements to which it is not a party. Therefore, the Court shall grant summary judgment to IUOE on these claims.

requested that President Hanley interpret Section XXIV(11)(e) of the IUOE constitution.[15] Plaintiffs' exhibit No. 7 (filed March 13, 1992; Docket Entry No. 66). After alerting President Hanley to the fact that the organic plant bargaining unit would try to rescind the cross-bumping agreement,[16] Mr. Kincade specifically inquired whether Section XXIV(11)(e) would permit one bargaining unit "to negotiate away the other [unit's] rights under the [cross-bumping agreement]" without the other unit's approval. Id. However, President Hanley did not answer Mr. Kincade's question. He merely said that it was not necessary at this time to interpret Section XXIV)11)(e) since the cross-bumping agreement

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[15]Section XXIV(11)(e) requires approval by "the membership affected" prior to execution of any proposed amendment to a collective bargaining agreement -- the same provision that Local 912 is now alleged to have violated.

[16]Mr. Kincade's letter states: "ICI's employees are very disgruntled and will probably try, encouraged by their Management, to negate and nullify the [cross-bumping agreement] that permits Rhone-Poulenc's employees to bump them." Plaintiff's exhibit No. 7.

was "already in existence" and not a "proposed" modification to a collective bargaining agreement. Plaintiffs' exhibit No. 8 (filed March 13, 1992; Docket Entry No. 66).

The Court concludes that there is a question of fact as to whether President Hanley's failure to respond to Mr. Kincade's question violated the union constitution. Mr. Kincade's letter stated that the organic plant employees were preparing to rescind the cross-bumping agreement and asked whether they could do so under the union constitution. President Hanley's response that the cross-bumping agreement was "already in existence" was beside the point and non-responsive to the question put to him. Ordinarily, courts give great deference to union officials' interpretation of their own constitution. United States v. Hoffa, 451 F.2d 706, 709 (6th Cir. 1971). However, when the constitution empowers a designated union official to

interpret the constitution and he fails to do so when asked, the Court thinks that it raises a question of fact whether the official has breached the constitution.

There is another question of fact whether IUOE breached Section VI(3) of its constitution. That section provides, in relevant part: "For the purpose of . . . assuring the performance of collective bargaining agreements or other duties of bargaining representative, . . . [the general president] shall have full power to . . . place such Local Unions and their officers and members under International Supervision . . . ." Plaintiffs' exhibit No. 51 (filed October 13, 1992; Docket Entry No. 160) at 22.

On July 10, 1991, two of the plaintiffs telefaxed a letter to President Hanley describing the conflict of interest in which the local union was embroiled and concluded as follows: "We would appreciate anything you

could do for us, as our union seems to be working against our best interest." Plaintiffs' exhibit No. 9 (filed march 13, 1992; Docket Entry No. 66). They also attached copies of their grievances against R-P Basic and ICIA. Although their letter did not inform President Hanley whether Local 912 intended to pursue the grievances, a response-letter from Mr. Kincade, dated July 16, 1991, indicated that Local 912 did not intend to pursue a grievance against R-P Basic because it would jeopardize Local 912's "fair and proper representation" of the organic plant bargaining unit. Plaintiff's exhibit No. 10 (filed March 13, 1992; Docket Entry No. 66) at 3. On August 15, 1991, President Hanley responded to the plaintiffs' telefax as follows:

> After reviewing this matter, I have determined that the referenced agreements were entered into by the Local Union as exclusive bargaining representative for the respective bargaining

> units, and that the International Union is not a party to those agreements. Accordingly, the International Union is without authority to alter or amend the terms of those agreements nor intervene in the subject matter of your letter.

Exhibit No. 5 (filed October 2, 1992; Docket Entry No. 152) to IUOE's motion for summary judgment.

President Hanley's response that the International Union is "without authority . . . to intervene" is contradicted by Section VI(3) of the union constitution, which provides that IUOE may place a local union under its supervision to "assure the performance" of the local union's functions as bargaining representative. Inasmuch as processing grievances against R-P Basic is one of Local 912's functions as bargaining representative, it appears that IUOE had the power to order Local 912 to process the grievance. Whether its failure to do so, despite its knowledge that Local 912 was not

going to proceed because of the conflict of interest, constitutes a breach of the IUOE constitution is another question of fact that may not be decided on summary judgment.[17]

B. Duty of Fair Representation Claims

The Supreme Court has explained the basis of the union's duty of fair representation as follows:

> The duty of fair representation exists because it is the policy of the National Labor Relations Act to allow a single labor organization to represent

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[17]The Court is mindful of the fact that the plaintiffs' claims against Local 912 and IUOE for breach of the union constitution concern the internal affairs of the union. For many years the Sixth Circuit Court of Appeals declined to intervene in such intra union matters. See Trail v. International Bhd of Teamsters, 542 F.2d 961, 966-68 (6th Cir. 1976). However, in Wooddell, the Supreme Court made it clear that Section 301 created a broad jurisdiction over claims for breach of union constitution. The Court said:

> Neither are we impressed by respondents' submission that our construction of § 301 will result in the inundation of the federal courts with trivial suits dealing with intra union affairs. While we are not persuaded that this argument should affect our interpretation of the language of the statute in any event, we find it unconvincing.

502 U.S. at ___, 112 S.Ct. at 500, 116 L.Ed.2d at 430-31.

> collectively the interests of all employees within a unit, thereby depriving individuals in the unit of the ability to bargain individually or to select a minority union as their representative. . . . The duty stands "as a bulwark to prevent arbitrary union conduct against individuals stripped of traditional forms of redress by the provisions of federal labor law."

DelCostello v. International Bhd. of Teamsters, 462 U.S. at 165 n.14, 103 S.Ct. at 2290 n.14, 76 L.Ed.2d at 489 n. 14 (citations omitted).

The standard of care that a union must exercise under its duty of fair representation has traditionally been defined as "serv[ing] the interests of all members without hostility or discrimination toward any, to exercise its discretion with complete good faith and honesty, and to avoid arbitrary conduct." Vaca v. Sipes, 386 U.S. at 177, 87 S.Ct. at 910, 17 L.Ed.2d at 850. Recently, the Supreme Court has stressed that great deference must nevertheless be accorded to a union's actions

on behalf of its members. In Air Line Pilots Assoc. v. O'Neill, 499 U.S. ___, ___, 111 S.Ct. 1127, 1130, 113 L.Ed.2d 51, 58 (1991), the Court said: "[A] union's actions are arbitrary only if, in light of the factual and legal landscape at the time of the union's actions, the union's behavior is so far outside a 'wide range of reasonableness,' Ford Motor Co. v. Huffman, 345 U.S. 330, 338, 73 S.Ct. 681, 686, 97 L.Ed. 1048, 1058, (1953), as to be irrational."

Furthermore, the Court has emphasized that conflicts between employees within a bargaining unit are inevitable, and the mere fact that some may be displeased with their union's actions does not constitute a breach of the union's duty of fair representation.

> "The complete satisfaction of all who are represented is hardly to be expected. A wide range of reasonableness must be allowed a statutory bargaining representative in serving the unit it represents, subject always to complete good faith and honesty in the exercise

> of its discretion." Ford Motor Co. v. Huffman, 345 U.S. at 338, 73 S.Ct. at 686, 97 L.Ed. at 1058. . . . [A union should not] be neutralized when the issue is chiefly between two sets of employees. Conflict between employees represented by the same union is a recurring fact. To remove or gag the union in these cases would surely weaken the collective bargaining and grievance processes.

Humphrey v. Moore, 375 U.S. 335, 349, 84 S.Ct. 363, 372, 11 L.Ed.2d 370, 382 (1964).

Below, the Court separately treats the duty of fair representation claims against Local 912 and IUOE.

1. **Local 912**

The plaintiffs have come forward with sufficient evidence that Local 912 breached its duty of fair representation in two separate ways. First, Local 912 negotiated the cross-bumping agreement out of the organic plant collective bargaining agreement, despite the fact that doing so would severely hinder the plaintiffs' ability to transfer from the

furnace plant. Then, Local 912 refused to process a grievance against R-P Basic to remedy the company's denial of the union members' transfer rights.

Local 912 has attempted to characterize the plaintiffs' situation as being like the one that the Supreme Court described in Humphrey v. Moore, supra, that is, that the plaintiffs are merely dissatisfied because their union chose a course of action that favored other union members. However, neither Humphrey v. Moore nor the other case on which the defendants rely, e.g., Ackley v. Local 337, Int'l Bhd of Teamsters, 948 F.2d 267 (6th Cir. 1991), are apposite. In all of those cases, the union defendant acted in a manner which favored some members of the same bargaining unit over other members of that bargaining unit. In the instant case, however, Local 912 failed to act in the interest of any members of the furnace plant

bargaining unit. Rather, it acted solely for the benefit of the organic plant bargaining unit, to the absolute detriment of the furnace plant bargaining unit. Local 912's actions were not a compromise between competing members of the same bargaining unit; they were a complete sellout of an entire bargaining unit.

The Supreme Court has carefully worded its opinions in a way that distinguishes the right of a union to favor certain members within a bargaining unit from the favoring of one bargaining unit over another. In Humphrey, for example, the Court said: "A wide range of reasonableness must be allowed a statutory bargaining representative in serving the unit it represents." 375 U.S. at 349, 84 S.Ct. at 372, 11 L.Ed. at 382 (emphasis added). See also Air Line Pilots Assoc. v. O'Neill, 449 U.S. at ____, 111 S.Ct. at 1134, 113 L.Ed.2d at 63 ("the exclusive agent's

statutory obligation to serve the interests of all members of a designated unit includes a statutory obligation to serve the interests of all members without hostility . . .") (emphasis added) (Quoting Vaca, 386 U.S. at 177, 87 S.Ct. at 910, 17 L.Ed.2d at 850); Ford Motor Co. v. Huffman, 345 U.S. at 337, 73 S.Ct. at 686, 97 L.Ed. at 1057 ("[labor unions'] statutory obligation to represent all members of an appropriate unit requires them to make an honest effort to serve the interests of all those members") (emphasis added). This distinction is proper, for it takes into account the fact that members of different bargaining units generally have no say in how another bargaining unit acts, even if the other unit is represented by the same union. By contrast, when a single bargaining unit is faced with a choice that may favor one faction within the unit, the unit's internal political processes will work to decide the

best course of action through discussion among all of the unit's members and, in most cases, a majority vote. The union, as the bargaining unit's exclusive representative, may then carry out the collective desires of the unit's membership.

In the instant case, Local 912 did not carry out the desires of any of the members of the furnace plant bargaining unit. To the contrary, it rebuffed them. By deleting the cross-bumping agreement from the organic plant collective bargaining agreement Local 912 greatly increased the risk that the plaintiffs would not succeed in transferring to the organic plant. In return for this sacrifice, members of the furnace plant bargaining unit got nothing (except the pleasure of knowing that their union had negotiated a good contract for another group of employees it happened to represent). From the perspective of members of the furnace plant bargaining

unit, Local 912's deleting the cross-bumping agreement from the organic plant bargaining agreement was completely arbitrary. Thus, a jury could find that it constituted a breach of Local 912's duty of fair representation.[18]

In addition, there is adequate evidence for a jury to find that Local 912's refusal to process the plaintiffs' grievance against R-P Basic violated the union's duty of fair representation.[19] Local 912 contends that its

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[18]There is paucity of reported opinions dealing with the situation here presented, that is a single union having a conflict of interest in representing two separate bargaining units. In one case, where the conflict was present but not at issue, the court observed: "[T]he extension of the principle of unfair representation to alleged preference of one bargaining unit over another by the same local has never, as far as we have been able to determine, been passed upon by the courts." Amalgamated Meat Cutters Local 195 v. Cross Bros. Meat Packers, Inc., 518 F.2d 113, 119 n. 13 (3d Cir. 1975). In a more recent case, the court entered judgment for the union upon find that there was no evidence that it had discriminated against the plaintiffs' bargaining unit in favor of another bargaining unit that it represented. Marshall v. Local Union No. 6, Brewers and Malsters, 960 F.2d 1360, 1370)8th Cir. 1992).

[19]As the Court has explained above, the plaintiffs' claim that Local 912's failure to process their grievance violated the duty of fair representation is an essential element of the plaintiffs' "hybrid" action against Local 912 and R-P Basic. Thus, if it is determined that Local 912 is not liable for failing to process the grievance, then R-P Basic must also be found

failure to process the grievance could not have violated its duty because it believed in good faith that the grievance would fail on the grounds that the cross-bumping agreement was deleted from the organic plant collective bargaining agreement. Furthermore, Local 912 points out that this belief was based on the advice of its attorney. Exhibit H to Local 912's statement (filed September 18, 1992; Docket Entry No. 140) of uncontested facts.

Generally, a union is "free to take a position" on whether or not it wishes to pursue a grievance on behalf of its members, as long as the union "t[akes] its position honestly, in good faith and without hostility

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not liable on the plaintiffs' Section 301 claims. Conversely, if R-P Basic is found not liable on the Section 301 claim, then Local 912 must be found not liable on the failure-to-process claim.

However, the plaintiffs' other duty of fair representation claim, based on Local 912's deleting the cross-bumping agreement from the organic plant collective bargaining agreement, is separate from the "hybrid" cause of action. If Local 912 is found not liable on this claim, R-P Basic will not automatically escape liability on its Section 301 claim, and vice versa.

or arbitrary discrimination." Humphrey v. Moore, 375 U.S. at 349-50, 84 S.Ct. at 372, 11 L.Ed.2d at 382. In an ordinary case, a union's showing that counsel had advised it that a grievance was futile would adequately demonstrate that the union's refusal to process the grievance did not violate the duty of fair representation. However, when the proffered impediment to the success of the grievance is the union's own action, taken in disregard of its members' interests, the Court does not think the union should be allowed to profit from its earlier misdeed and thereby avoid liability on the grounds that it honestly believed that it had thrown away its members' rights. This is especially true in the instant case where Local 912 had lengthy consultations with its attorney before it ever agreed to delete the cross-bumping agreement from the organic plant collective bargaining agreement. See exhibit A (deposition of James

Kincade) to Local 912's statement of uncontested facts at 51-52.

Furthermore, there is evidence that Local 912's reluctance to process the grievance was not solely based on its belief that the grievance would fail. In a letter that Local 912's business manager, James Kincaid, sent to IUOE General President Hanley before Local 912's attorney advised that the grievance was futile, Mr. Kincade admitted that he feared what would happen if R-P Basic granted the plaintiffs' grievance. He wrote:

> Suppose Rhone-Poulenc grants the grievance. How can Local 912 make ICI[A] take the employees from Rhone-Poulenc[?] If Local 912 goes to court, in an effort to do so, where does that leave Local 912 with its members at ICI[A] as to fair and proper representation? This is one of the dilemmas I discussed with Branstetter, our attorney. This is one of the reasons he recommended against the grievance route.

Plaintiffs' exhibit No. 9 (filed March 13, 1992; Docket Entry No. 66) at 3.

There is adequate evidence to support a jury's finding that Local 912's refusal to process the plaintiffs' grievance violated its duty of fair representation. Accordingly, the Court shall not grant summary judgment on that claim.

2. IOUE

The plaintiffs' claim that IUOE breached its duty of fair representation is meritless. The duty of fair representation derives from the fact that a union is the exclusive bargaining representative of a bargaining unit, and the members are therefore completely dependent on the union to represent their interests. See, e.g., DelCostello, 462 U.S. at 165 n.14, 103 S.Ct. at 2290 n.14, 76 L.Ed.2d at 489 n.14. However, in the instant case, Local 912, not IUOE, was the exclusive bargaining representative of the plaintiffs.

The plaintiffs have attempted to gloss over this critical fact by treating Local 912

and IUOE collectively as "the Union Defendants." Amended complaint at ¶ 23. However, the Sixth Circuit Court of Appeals has previously passed on the relationship between IUOE and its individual locals. In Shimman v. Frank, 625 F.2d 80 (6th Cir. 1980), the court stated:

> The International Union is a separate body from the local. The acts of the local and its agents cannot automatically be imputed to the International. This is clear from the International Union of Operating Engineers' Constitution which defines the relationship between the International and its affiliated locals. Under the constitution, the local unions govern themselves and transact business on their own behalf.

Id. at 97.

The Sixth Circuit's opinion in Allen v. Allied Plant and Maint. Co. of Tenn., 881 F.2d 291 (6th Cir. 1989), relied on by the plaintiffs, is not to the contrary. In that case, the collective bargaining agreement provided for IUOE to participate in the

handling of employee grievances thereby charging IUOE with a duty of fair representation. Id. at 297. Moreover, in that case, IUOE actually conspired to select an arbitrator that it thought was likely to rule against the employee. Id. This is a far cry from IUOE's role in the instant case, which at most consisted of a refusal to get involved when asked to do so. See Shimman, 625 F.2d at 98 ("The wrongful conduct of these local union leaders cannot be imputed to the International, absent proof of actual participation or ratification.").

There being no evidence that IUOE owed a duty of fair representation to the plaintiffs, or that it participated in or ratified the allegedly faulty representation by Local 912, the Court shall grant summary judgment to IUOE on this claim. See Ruzicka v. General Motors Corp., 523 F.2d 306, 309 (6th Cir. 1975).

C. LMRDA Section 101 Claims.

LMRDA Section 101, 29 U.S.C. § 411, is commonly called the union members' "Bill of Rights." Local No. 82, Furniture and Piano Movers v. Crowley, 467 U.S. 526, 536, 104 S.Ct. 2557, 2563, 81 L.Ed.2d 457, 467 (1984). It "guarantee[s] every union member equal rights to vote and otherwise participate in union decisions, freedom from unreasonable restrictions on speech and assembly, and protection from improper discipline." Id.

The parties have stipulated that the plaintiffs' LMRDA Section 101 claim "is limited to the allegations of the plaintiffs of their lack of involvement and participation in the declaratory judgment action [that Local 912 filed in October 1990 and voluntarily dismissed in June 1991] and in the 1991 negotiations between ICI[A] and Local 912 for the Collective Bargaining Agreement that resulted from those negotiations."

Stipulation (filed September 25, 1992; Docket Entry No. 145).

The Court concludes that summary judgment should be granted for the union defendants on both claims.

LMRDA Section 101 specifically designates which rights are protected under the Act. The right of union members to participate in a lawsuit filed by their union is not listed. As the Court of appeals for the District of Columbia Circuit has said: "`[D]emocracy' under the LMRDA is not merely a boundless ideal to be defined by the whim of any dissident voice; rather, the statutory notion of internal union democracy is precisely limited by the scope of the protections codified by Congress in the LMRDA." Carothers v. Presser, 818 F.2d 926, 929 (D.C. Cir. 1987).

Likewise, the right of union members to negotiate and vote on proposed collective bargaining agreements is strictly limited to

the bargaining unit that will work under the proposed agreement. Other union members, even though they may be affected by the agreement, have no Section 101 right to participate in negotiations or vote on the proposal.[20] Marshall v. Local Union No. 6, Brewers and Malsters, 960 F.2d 1360, 1369 (8th Cir. 1992) ("Local 6 properly excluded the yeast workers, non-members of the brewery workers' collective bargaining unit, from voting on the brewery workers' collective bargaining agreement. . . . Local 6 did not violate LMRDA . . . ."). Because there is no evidence that the union defendants violated any statutory right guaranteed to union members by LMRDA Section 101, the Court shall grant summary judgment for the defendants.

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[20]Of course, an individual union is free in its own constitution to grant its members greater rights than those guaranteed by LMRDA. Thus, the Court's conclusion that LMRDA Section 101 did not guarantee the plaintiffs a right to vote on the organic plant bargaining agreement does not mean that the IUOE constitution did not make such a guarantee. See supra part II.A.3.

D. Pendent State Law Claims

The Court shall also grant summary judgment for the defendants on the plaintiffs' state law claims of tortious interference with a contract and civil conspiracy.[21]

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[21]The parties have argued at length whether the plaintiffs' state law claims are preempted by federal labor law. This question is difficult to answer because the basis of the claims is unclear. The amended complaint states, rather imprecisely, the state law claims as follows:

> 24. The Defendants acted in concert and conspired with each other to deprive Plaintiffs of vested contract rights. . . . Defendants tortiously interfered with vested contract rights of the Plaintiffs.

Amended complaint at ¶ 24.

To the extent that the plaintiffs are alleging that one of the defendants intentionally interfered with a contract to which it was not a party or otherwise bound, then that claim would not be preempted. See Dougherty v. Parsec, Inc., 872 F.2d 766, 771 (6th Cir. 1989) ("[A]llowing a state law action to proceed against a party who has not signed the labor contract, and whose obligations are not defined by the contract, will neither define nor modify the contractual relationship between the employer and the union, [which relationship is governed exclusively by federal law]."). However, as explained infra, the plaintiffs have failed to provide sufficient evidence to support any such claim.

To the extent that the plaintiffs allege that one of the defendants tortiously interfered with its own contract or conspired to breach its own contract, such a claim would be preempted as merely "relabelling" a LMRA Section 301 breach-of-contract action as a tort. Allis-Chalmers Corp. v. Lucek, 471 U.S. 202, 211, 105 S.Ct. 1904, 1911, 85 L.Ed.2d 206, 215 (197\85) ("Any other result would elevate form over substance and allow

1. **Tortious Interference with a Contract**

Tennessee law recognizes both a common law and a statutory cause of action for tortious interference with a contract. Polk and Sullivan, Inc. v. United Cities Gas Co., 783 S.W.2d 538, 542 (Tenn. 1989). The statutory cause of action,, Tenn. Code Ann. § 46-50-109, is merely a codification of the common law. Id. In order to recover for tortious interference with a contract, "the plaintiff must prove that there was a legal contract, of which the wrongdoer was aware, that he maliciously intended to induce a breach, and there must have been a breach, proximately caused by [the wrongdoer's] acts resulting in damages." Id. at 543. Tennessee law does not recognize tortious interference of a contract by one who is a party to the

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parties to evade the requirements of § 301 by relabelling their contract claims as claims for tortious breach of contract.").

contract. Koehler v. Cummings, 380 F.Supp. 1294, 1313 (M.D. Tenn. 1974).

Below, the Court separately treats the claims against each defendant.

(a) ICIA

The plaintiffs allege that ICIA, by deleting the cross-bumping agreement from the 1991 organic plant collective bargaining agreement, induced R-P Basic to breach its obligations under the cross-bumping agreement. However, there is no evidence that ICIA acted with malice. To the contrary, the Court concludes that ICIA was entirely justified in its actions. See Polk and Sullivan, Inc., 783 S.W.2d at 543 (Justification exists when "defendant has acted merely in the due exercise of his own right to carry on his business himself."). Once layoffs were announced at the furnace plant, ICIA reasonably feared having its organic plant employees displaced. It sought to avoid this

disruption by deleting the cross-bumping agreement from the organic plant bargaining agreement, thereby ending its obligation to accept the laid-off furnace plant employees.

The plaintiffs have offered no evidence that ICIA acted "maliciously" in deleting the cross-bumping agreement. Malice is an essential element of tortious interference with a contract under Tennessee law. Testerman v. Tragesser, 789 S.W.2d 553, 556-557 (Tenn. App. 1987). To act maliciously, in the sense that term is used as an element of tortious interference with a contract, means to act with "spite or ill will" toward the plaintiffs. Heheman v. E.W. Scripps Co., 661 F.2d 1115, 1127 (6th Cir. 1981); Testerman v. Tragesser, 789 S.W.2d at 556-57. "No reasonable argument can be made" that ICIA's negotiation OF THE 1991 collective bargaining agreement "was motivated by spite or ill will against parties with whom it had never dealt."

Heheman, 661 F.2d at 1127. ICIA did no more than enter into a new contract on terms that were agreeable to it for its own legitimate business reasons.

(b) R-P Basic and R-P Inc.

The plaintiffs further claim that R-P Basic tortiously interfered with Local 912's contractual obligation to fairly represent them. They emphasize the fact that R-P Basic ordinally announced that layoffs would begin in February, 1991, but then delayed the layoffs until July, 1991. According to the plaintiffs, this delay was part of a calculated plan by R-P Basic to force Local 912 into negotiating a new organic plant collective bargaining agreement against the interests of the plaintiffs.[22]

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[22] To the extent that the plaintiffs allege that R-P Basic's delaying the layoffs contributed to its own breach of the furnace plant bargaining agreement, their claim is preempted by LMRA Section 301. See supra note 21. In any event, the R-P defendants would be entitled to summary judgment because Tennessee law does not recognize tortious interference with one's own contracts. Koehler v. Cummings, 380 F.Supp. at 1313.

Whether or not the plaintiffs' allegations are true, the R-P defendants are entitled to summary judgment, for the plaintiffs have produced no evidence that Local 912 is contractually bound to fairly represent them. As the Court has previously observed, the IUOE constitution does not contain any promise that the union will fairly represent its members. See supra part II.A.3. Local 912's duty of fair representation arises from the statutory scheme of federal labor law, not from the provisions of the IUOE constitution. See DelCostello v. International Bhd. of Teamsters, 462 U.S. at 165 n. 14, 103 S.Ct. at 2290 n.14, 76 L.Ed.2d at 489 n.14.

(c) Local 912 and IUOE

The plaintiffs make the additional claim that Local 912, by deleting the cross-bumping agreement from the organic plant collective bargaining agreement, induced R-P Basic to

breach the furnace plant collective bargaining agreement. They further claim that IUOE is liable because it ratified and participated in the actions of Local 912. However, Local 912 is a party to the furnace plant bargaining agreement. Therefore it cannot be liable for tortious interference with that agreement under Tennessee law. Koehler v. Cummings, 380 F.Supp. at 1313.

Furthermore, inasmuch as Local 912 did nothing that could constitute tortious interference with a contract, IUOE cannot be liable for ratifying and participating in Local 912's actions.

2. **Civil Conspiracy**

Tennessee law defines a civil conspiracy as follows: "a combination between two or more persons to accomplish by concert an unlawful purpose or to accomplish a purpose not in itself unlawful by unlawful means." Id. (citations omitted).

As the Court has just explained, the plaintiffs have failed to demonstrate that any of the defendants committed a tortious interference with a contract. Thus, the plaintiffs have not shown any "unlawful purpose" for which the defendants combined to use "unlawful means" to accomplish a lawful purpose. Accordingly, the Court shall grant summary judgment for the defendants on the plaintiffs' civil conspiracy claim.

E. Jury Demand

Defendant Local 912 has objected to the plaintiffs' request that this case be tried to a jury. Local 912 contends that the core of the plaintiffs' lawsuit is a demand for equitable relief against ICIA in the form of jobs at the organic plant. Therefore, Local 912 argues, this Court should treat this case as one in equity and try it without the intervention of a jury.

Whether or not Local 912's analysis is correct, it is irrelevant since the Court has dismissed ICIA as a defendant. AS it now stands, this action is essentially one for money damages. As such, the plaintiffs' jury demand shall be granted. See Teamsters v. Terry, 494 U.S. 558, 110 S.Ct. 1339, 108 L.Ed.2d 519 (1990) (jury trial was proper in hybrid Section 301/duty of fair representation action seeking monetary relief).

F. Standing of Plaintiff Robert "Rickey" Farmer

ICIA argues that plaintiff Robert "Rickey" Farmer has no standing in this action because he was hired too late to qualify for rights under the cross-bumping agreement. The Court disagrees.

The cross-bumping agreement creates a transfer right for any furnace plant employee hired prior to September 11, 1982, who had sufficient seniority to displace an existing

organic plant employee. Plaintiff Farmer was hired on August 15, 1977. Plaintiffs exhibit No. 50 (filed October 13, 1992; Docket Entry No. 160) at 72. At the time the cross-bumping agreement was executed, he had greater seniority than three organic plant employees. Plaintiffs exhibit No. 49 (filed October 13, 1992; Docket Entry No. 160) at 66.

Contrary to the assertion of ICIA, the fact that the three junior organic plant employees were in a different department from plaintiff Farmer is of no consequence. The cross-bumping agreement does not restrict transfer rights to particular departments.

G. Standing of Plaintiffs Mark Hunt and Andrew Scott

ICIA further challenges the standing of plaintiffs Mark Hunt and Andrew Scott. It alleges that they forfeited their rights to transfer to the organic plant when the declined an opportunity to transfer in

November, 1985. In support of this allegation, ICIA has submitted copies of "Notice of Intent" forms in which plaintiffs Hunt and Scott indicated that they waived their transfer rights. Appendix (filed September 18, 1992; Docket Entry No. 136) to ICIA's motion for summary judgment at 633-34.

However, plaintiffs Scott and Hunt have sufficiently rebutted ICIA's evidence to create a question of fact whether they ever declined an opportunity to transfer. According to the affidavit of Andrew Scott, an agent of R-P Basic told him that the "Notice of Intent" form would only become effective if there were layoffs at the furnace plant in 1985 and that the form would be destroyed if the layoffs were canceled. Plaintiffs' exhibit No. 15 (filed October 13, 1992; Docket Entry No. 160). Plaintiff Scott further avers that the 1985 layoffs were in fact canceled; thus, none of the plaintiffs ever had an

opportunity to exercise their transfer rights at that time. Id.

Because there is a question of fact whether plaintiffs Scott and Hunt ever waived their transfer rights, the Court shall not dismiss them as plaintiffs in this action.

III.

For the reasons set forth above, the Court shall grant the plaintiffs' jury demand.

The Court shall dispose of the various pending motions as follows:

A. R-P Basic and R-P Inc.'s Joint Motion to Dismiss or for Summary Judgment

The motion shall be granted in part and denied in part.

The Court shall enter summary judgment for the R-P defendants on all LMRA Section 301 claims, except the claims for breach of the cross-bumping agreement and the 1988 furnace plant collective bargaining agreement, brought by plaintiffs who did not sign a waiver

releasing R-P Basic from liability in exchange for severance benefits.

The Court shall enter summary judgment for the R-P defendants on all pendent state law claims.

Accordingly, the only claims remaining against R-P Basic and R-P Inc. are the LMRA Section 301 claims for breach of the 1988 furnace plant collective bargaining agreement and the cross-bumping agreement, brought by plaintiffs who did not sign a waiver releasing R-P Basic from liability.

B. ICIA's Motion for Summary Judgment

The motion shall be granted in full.

ICIA shall be dismissed as a party to this lawsuit.

C. Local 912's Motion for Summary Judgment

The motion shall be granted in part and denied in part.

The Court shall enter summary judgment for Local 912 on all LMRA Section 301 claims,

except the claim for breach of Section XXIV(11)(e) of the IUOE constitution.

The Court shall enter summary judgment for Local 912 on the LMRDA Section 101 claims and the pendent state law claims.

The Court shall deny summary judgment on the duty of fair representation claims.

Accordingly, the only claims remaining against Local 912 are the LMRA Section 301 claims for breach of Section XXIV(11)(e) of the IUOE constitution and the duty of fair representation claims.

D. IUOE's Motion for Summary Judgment

The motion shall be granted in part and denied in part.

The Court shall enter summary judgment for IUOE on all LMRA Section 301 claims, except the claim that IUOE breached Sections VI(2) and VI(3) of the IUOE constitution.

The Court shall enter summary judgment for IUOE on the duty of fair representation

claims, the LMRDA Section 101 claims, and the pendent state law claims.

Accordingly, the only claims remaining against IUOE are the LMRA Section 301 claims for breach of Sections VI(2) and VI(3) of the IUOE constitution.

An appropriate order shall be entered.

/s Thomas A. Higgins
Thomas A. Higgins
United States District Judge

UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF TENNESSEE
COLUMBIA DIVISION

ALBERT AKINS, et al.	]	
	]	
v.	]	No. 1-91-0134
	]	Judge Higgins
ICI AMERICAS INC., et al.	]	

O R D E R

In accordance with the memorandum contemporaneously entered, the plaintiffs' jury demand is granted.

The various motions before the Court are disposed of as follows:

1. Joint Motion (filed February 14, 1992: Docket Entry No. 51) of defendants Rhone-Poulenc Basic Chemicals Company and Rhone-Poulenc, Inc. to dismiss or for summary judgment.

The motion is granted in part and denied in part.

Summary judgment is granted for the movants on all LMRA Section 301 claims, except the claims for breach of the crossbumping agreement and the 1988 furnace plant

collective bargaining agreement, brought by plaintiffs who did not sign a waiver releasing Rhone-Poulenc Basic Chemicals Company from liability in exchange for severance benefits. Summary judgment is granted for the movants on all pendent state law claims.

Accordingly, the only claims remaining against Rhone-Poulenc Basic Chemicals Company and Rhone-Poulenc, Inc. are the LMRA Section 301 claims for breach of the 1988 furnace plant collective bargaining agreement and the cross-bumping agreement, brought by plaintiffs who did not sign a waiver releasing R-P Basic from liability.[1]

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[1]The only plaintiffs whose signed waivers are part of the record are the following: Gene Barker, Tony Brock, William T. Colvert, Robert Gilliam, Danny S. Green, Jerry Hicks, Walter Hudspeth, Mark Hunt, Nadine James, Richard W. James Jr., William L. Jarrett, Terry Jennings, Raymond Neely, Terrance Nevette, Ralph Osborn, David Paley, Michael Pilkinton, Charles S. Robinson Jr., James R. Scott Jr., Joseph Shyes, Sharon Liles Steiner, William T. Thomason, Robert J. Tidwell, and Geneva Wiggins.

2. Motion (filed September 18 1992: Docket Entry No. 133) of defendant ICI Americas, Inc. (now "Zeneca, Inc.") for summary judgment.

The motion is granted in full.

ICI Americas, Inc. is dismissed as a party to this lawsuit.

3. Motion (filed September 18, 1992: Docket Entry No. 138) of defendant Local Union No. 912, International Union of Operating Engineers for summary judgment.

The motion is granted in part and denied in part.

Summary judgment is granted for the movant on all LMRA Section 301 claims, except the claim for breach of Section XXIV(11)(e) of the IUOE constitution.

Summary judgment is granted for the movant on the LMRDA Section 101 claims and the pendent state law claims.

Summary judgment is denied on the duty of fair representation claims.

Accordingly, the only claims remaining against Local Union No. 912, International

Union of Operating Engineers, are the LMRA Section 301 claim for breach of Section XXIV(11)(e) of the IUOE constitution and the claims for breach of the duty of fair representation.

4. Motion (filed October 2, 1992; Docket Entry No. 149) of defendant International Union of Operating Engineers for summary judgment.

The motion is granted in part and denied in part.

Summary judgment is granted for the movant on all LMRA Section 301 claims, except the claims for breach of Sections VI(2) and VI(3) of the IUOE constitution.

Summary judgment is granted for the movant on the duty of fair representation claims, the LMRDA Section 101 claims, and the pendent state law claims.

Accordingly, the only claims remaining against International Union of Operating Engineers are the LMRA Section 301 claims for

breach of Sections VI(2) and VI(3) of the IUOE constitution.

It is so ORDERED.

/s Thomas A. Higgins
Thomas A. Higgins
United States District Judge
6-28-93

UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF TENNESSEE
NASHVILLE DIVISION

ALBERT AKINS, et al.	]	
	]	
v.	]	No. 1-91-0134
ICI AMERICAS INC., et al.	]	Judge Higgins

MEMORANDUM

The Court has before it the motions[1] of each of the remaining defendants for reconsideration, to alter or amend or certify

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[1]Defendant International Union of Operating Engineers filed its motion on July 14, 1993 (Docket Entry No. 174); defendant Local Union No. 912, International Union of Operating Engineers filed its motion on July 14, 1993 (Docket Entry No. 176); and defendants Rhone-Poulenc, Inc. and Rhone-Poulenc Basic Chemicals Co. filed their joint motion on July 15, 1993 (Docket Entry No. 182).

Defendant Local 912, International Union of Operating Engineers also filed a motion on August 11, 1993 (Docket Entry No. 189) for oral argument and postponement of trial date. Defendant International Union of Operating Engineers filed a similar motion on August 12, 1993 (Docket Entry No. 190). The Court is adequately familiar with the issues in this case. Therefore, further argument is unnecessary, and these motions for oral argument and postponement of trial date shall be denied.

for interlocutory appeal this Court's order entered June 29, 1993 (Docket Entry No. 172). For the reasons set forth below, the Court shall deny the aforementioned motions.

I.

The facts of this case have been fully described in the Court's memorandum entered June 29, 1993 (Docket Entry No. 171).

The action is set to be tried before a jury on Monday, October, 18, 1993.

II.

a. Motions to amend.

In its previous memorandum entered June 29, 1993 (Docket Entry No. 171), the Court stated the reasons for denying in part the remaining defendants' motions for summary judgment. The Court continues to rely on those reasons as the basis for denying the instant motions for reconsideration and to alter or amend.

However, it appears from the motion papers that the plaintiffs, Robert R. Farmer, Mike Fazekas, Gerald Isabell, William F. Jarratt, John R. Lindsey, and James D. Riddle, have signed waivers, exhibit No. 2 to supplemental affidavit of Paul S. Pruett (filed July 23, 1993; Docket Entry No. 184), that release defendant Rhone-Poulenc Basic Chemicals Co. from all its obligations to them in exchange for severance benefits. Therefore, the Court shall enter summary judgment in full to defendants Rhone-Poulenc Basic Chemicals Co. and Rhone-Poulenc, Inc. on all claims by these plaintiffs. See memorandum entered June 29, 1993 (Docket Entry No. 171) at 19-23.

b. Motions to certify for interlocutory appeal.

Interlocutory appeal "should be sparingly granted. In re April 1977 Grand Jury Subpoenas, 584 F.2d 1366, 1369 (6th Cir.

1974). A would-be appellant has the burden of convincing a district court that "exceptional circumstance" justify departing from the ordinary practice of awaiting final judgment in order to avoid piecemeal litigation. Coopers & Lybrand v. Livesay, 437 U.S. 463, 474-75, 98 S.Ct. 2454, 2461, 57 L.Ed.2d 351, 361-62 (1978).

Four elements must be present before a district court may certify an order for interlocutory appeal:

> (1) The question involved must be one of "law"; (2) it must be "controlling"; (3) there must be substantial ground for "difference of opinion" about it; and (4) an immediate appeal must "materially advance the ultimate termination of the litigation."

Cardwell v. Chesapeake and Ohio Ry. Co., 504 F.2d 444, 446 (6th Cir. 1974) (quoting 28 U.S.C. § 1292(b)).

An interlocutory appeal would not materially advance the termination of this litigation. Pre-trial discovery is complete,

and trial is set to begin less than two months from now. By contrast, many more months would pass before this case could be heard by the Sixth Circuit Court of Appeals on an interlocutory basis. See id. Furthermore, the facts of this case are in dispute. A trial on the merits will distill the pure questions of law and provide a complete record for any subsequent appeal.

Therefore, certification for an interlocutory appeal is not warranted.

III.

For the reasons set forth above, the motions for reconsideration, to alter or amend or certify for interlocutory appeal shall be denied.

Further, summary judgment in favor of the defendants, Rhone-Poulenc Basic Chemicals Co. and Rhone-Poulenc, Inc., shall be granted on the claims of the plaintiffs, Robert R. Farmer, Mike Fazekas, Gerald Isabell, William

F. Jarratt, John R. Lindsey, and James D. Riddell.

/s Thomas A. Higgins
Thomas A. Higgins
United States District Judge
8/26/93

UNITED STATES DISTRICT COURT MIDDLE DISTRICT
OF TENNESSEE NASHVILLE DIVISION

ALBERT AKINS, et al.	]	
	]	
v.	]	No. 1-91-0134
	]	Judge Higgins
ICI AMERICAS INC., et al.	]	

O R D E R

In accordance with the memorandum contemporaneously entered, the following motions are denied:

1. Motion (filed July 14, 1993; Docket Entry No. 174) of the defendant, International Union of Operating Engineers, to alter or amend or certify for interlocutory appeal.

2. Motion (filed July 14, 1993; Docket Entry No. 176) of the defendant, Local Union No. 912, International Union of Operating Engineers, for reconsideration or certify for interlocutory appeal.

3. Motion (filed July 15, 1993; Docket Entry No. 182) of the defendants,- Rhone-Poulenc Basic Chemicals Co. and Rhone-Poulenc,

Inc., for reconsideration or certify for interlocutory appeal.

4. Motion (filed August 11, 1993; Docket Entry No. 189) of the defendant, Local Union No. 912, International Union of Operating Engineer, for oral argument and postponement of trial date.

5. Motion (filed August 12, 1993; Docket Entry No. 190) of the defendant, International Union of Operating Engineer, for oral argument and postponement of trial date.

Further, summary judgment is granted in full to defendants Rhone-Poulenc Basic Chemicals Co. and Rhone-Poulenc, Inc. on all claims brought by plaintiffs Robert R. Farmer, Mike Fazekas, Gerald Isabell, William F. Jarratt, John R. Lindsey, and James D. Riddle.

It is so ORDERED.

/s Thomas A. Higgins
Thomas A. Higgins
United States District Judge
8/26/93

UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF TENNESSEE
COLUMBIA DIVISION

ALBERT AKINS, et al.,

Plaintiffs,

vs. No. 1-91-0134
Judge Higgins

ICI AMERICAS, INC., et al.,

Defendants.

TRANSCRIPT OF PROCEEDINGS - BENCH RULING

VOLUME IV OF 4

BEFORE THE HON. THOMAS A. HIGGINS,
U.S. District Judge and a Jury,
on October 21, 1993

APPEARANCES:

As hereinbefore noted.

P R O C E E D I N G S

(Whereupon, the following proceedings were held within the presence and hearing of the jury, to-wit:)

THE COURT: Good morning, ladies and gentlemen, have your seats, please.

THE CLERK: Columbia Civil Action 1-91-0134, Albert Akins and others versus ICI Americas and others.

Plaintiffs present and ready?

MR. STEINER: Plaintiffs are ready, Your-Honor.

THE CLERK: Defendants present and ready?

MR. OZIER: Rhone Poulenc defendants are ready, Your Honor.

MR. BRANSTETTER: Defendant Local 912 is ready.

MR. BARRETT: Defendant International present and ready, Your Honor.

THE COURT: Ladies and gentlemen of the jury, I have asked the Marshal to have you

come into court this morning because the court has determined, after having fully heard the evidence of the plaintiffs in this case and the arguments of the lawyers at considerable length, that this is a matter for resolution by the court and not a matter for submission to you for resolution. This determination is reached as a matter of law. But I want you here because I think it's important that you know the reasons why the court has reached the decision it has reached.

Federal Judges have a duty of accountability to the public and to the litigants who come before the court, and that duty of accountability is broader than just advising the lawyers for the parties of the reasons for the court's actions. The people who bring the lawsuit have a right to know why a decision is reached and to have the benefit of a reasoned analysis for the court's decision.

And I think it's also important that you know because you have been summoned and are part of the process, and I don't want you to leave thinking that your time has been wasted or you serve no useful purpose. You are the forum before whom this matter was submitted, in anticipation that it would ultimately come to you for resolution. Not all cases go to the jury for ultimate resolution if the matter to be determined turns out to be determined as a matter of law.

So I think you should know that you haven't wasted your time. You have served a useful purpose. You were the forum before whom these parties came in and presented their case, and for that reason I want you to know as well as these many plaintiffs who are gathered here in this big room as well as the representatives of the parties the reasons why the court has reached a decision that this case is to be decided as a matter of law and

not submitted to you for your consideration and deliberation.

We are now at the close of the plaintiffs' proof. The plaintiffs have put on their case in chief. Rule 50 of the Federal Rules of Civil Procedure provides for judgments as a matter of law, if during a trial by jury a party has been fully heard with respect to an issue and there is no legally sufficient evidentiary basis for a reasonable jury to have found for that party with respect to that issue, the court may grant a motion for judgment as a matter of law against that party on any claim that cannot, under the controlling law, be maintained without a favorable finding on that issue. Now we are at that point. The plaintiffs have been fully heard, their case in chief has been closed, and the defendants have made their motions for judgment as a later of law.

Now at this juncture the court is required under the applicable rule to view all the evidence in the light most favorable to the plaintiffs, to discard the countervailing evidence, and view all inferences that may be well taken in favor of the plaintiffs.

This case, in a certain respect, is relatively unusual. Perhaps it might not be correct to say it is unique, but it is relatively unusual. The parties agree that the basic instruments, the writings between the parties, are unambiguous, they are clear and they present matters that call for the court's construction or interpretation.

And I note the plaintiffs, in their pretrial brief filed October 14, 1993, at Docket Entry 234, states the cross bumping agreement, the applicable collective bargaining agreements and the union constitutions are clear; and that raises these

matters for the court's consideration and its determination as a matter of law.

Now in this case the plaintiffs are former and some still presently are employed by the defendant Rhone Poulenc, Inc. and Rhone Poulenc Basic Chemicals Company, the two named corporate defendants; some are former employees as a result of a layoff and some others remain employed for a limited period of time as a part of the close down procedures for what is commonly referred to as the furnace plant.

Now in this case the first claim asserted- by the plaintiffs is a claim under Section 301 of the Labor Management Relations Act. In Section 301 the Congress provided that members of a labor organization may bring a cause of action against the labor organization for a breach of the duty of fair representation, and against the employer for a breach of the collective bargaining agreement.

This type of claim under Section 301 of the Labor Management Relations Act is sometimes referred to as a hybrid claim. It is called a hybrid claim because in order to succeed, the plaintiffs, who bring the action, must establish their cause of action against both the union for a breach of the duty of fair representation and against the employer for a breach of the collective bargaining agreement.

If the party who brings the action, the plaintiffs, fail on either prong, that is, fail to establish their claim of a breach of a duty of fair representation or if they fail to establish their claim of a breach of the collective bargaining agreement, their action fails. They have to succeed, in very plain words, in their claim against both the union, their statutory bargaining agent and representative, and they have to succeed in

their claim against the employer under the collective bargaining agreement.

Now in this case the relevant, salient facts bearing on this first claim of the plaintiffs arises out of the history of the operation of the former Stauffer Chemical Company plant at Mt. Pleasant, which at one time owned both facilities, that is, what is known as the furnace plant and the organic plant.

The evidence in this case tells us that the employees at both these plants, which at one point were owned by the Stauffer Chemical Company, were covered by the same collective bargaining agreement between Stauffer and Local 912 of the International Union of Operating Engineers.

In September of 1982, Stauffer and Local 912 agreed to divide the two plants into separate units for purposes of collective bargaining agreements. As a part of the

process of negotiating separate collective bargaining agreements, Stauffer and Local 912 agreed to a separate memorandum of agreement that has been referred to in this case as the memorandum agreement of September 1982, even though the agreement itself is not dated; it has also been referred to in common parlance as the cross bumping agreement. And this agreement was incorporated by reference in the two collective bargaining contracts covering the furnace plant and the organic plant in 1982.

Now as to this memorandum agreement, which is before the court and in evidence, and which the parties agree is unambiguous, any questions about its interpretation and construction are questions for the court. Certain employees of both plants who had sufficient seniority were given a one time opportunity to bump, as the term is used, or displace less senior employees in the

other plant in the event of their layoff from either facility.

Now I am going to pause at this point and say that the agreement is before the court and it says what it says. At certain points in the papers submitted to the court the suggestion was made by the plaintiffs that this was some kind of job guarantee, and it is important that the court disabuse that notion. This instrument did not guarantee jobs. It spoke very specifically about the right on a one-time basis, under certain conditions, assuming certain skills existed or could be demonstrated, to transfer from one plant to another, and at that time, when it was adopted and agreed to, both plants were owned by a common employer.

Now this memorandum agreement was again incorporated into the collective bargaining agreements that were negotiated for each plant by Stauffer and Local 912 in 1985.

After the agreement of 1985 became effective, certain changes in ownership of the chemical plant at Mt. Pleasant owned by Stauffer took place and through a series of changes of ownership it developed that in 1987, during the existence of the 1985 collective bargaining agreement, that the furnace plant wound up being owned by the Rhone Poulenc companies and the organic plant wound up being owned by the Imperial Chemical Corporation, commonly referred to as ICIA.

Now at the time the collective bargaining agreements of 1985 expired, the evidence in this case reflects that both ICI at the organic plant and Rhone Poulenc at the furnace plant negotiated separate collective bargaining agreements with Local 912 in 1988. During these negotiations the evidence tells us, and in that respect Mr. Paley was on the negotiating committee for the furnace plant in 1988, Rhone Poulenc tried to get Local 912 to

agree to delete all references to the 1982 agreement. And we were also told through the evidence that ICI, likewise, sought to obtain the deletion of that agreement from being incorporated into any new agreement in 1988. However, the union refused, and the 1988 collective bargaining agreements subsequently negotiated with regard to both plants stated the memorandum agreement was considered supplemental, again, that is, it was incorporated by reference, and would remain in effect for the duration of the collective bargaining agreement.

Now although Rhone Poulenc was not successful in getting Local 912 to delete any reference to the memorandum agreement, the parties in that series of negotiations, in which Mr. Paley, the last witness we heard,

Participated, did get the union to agree as the last item on the bargaining table to a new agreement referred to as the October

1988 agreement. In this agreement, again it is in evidence, and before the court, it is agreed that if it presents any questions as to its construction are questions that are presented to the court, the net effect of that agreement is to clarify the obligation of Rhone Poulenc under the 1982 agreement, and that agreement contains the words to the effect that if a layoff occurs and the layoff takes place according to the sections of the collective bargaining agreement regarding seniority, or if the layoffs take place under the terms of the 1982 memorandum of agreement, then the company would have fulfilled all of its obligations under the 1982 memorandum agreement.

Now in 1990 an announcement was made that the furnace plant would close over some period of time resulting in a layoff of its employees, including most of the plaintiffs.

Now the evidence tells us that pursuant to the memorandum agreement, Rhone Poulenc took steps to facilitate the transfer of its employees to the organic plant by providing the employees with a form on which laid off employees could indicate their desire to transfer, and these were forwarded to ICI, which returned them and evidenced its refusal to accept the requested transfers.

Now when the plaintiffs were not permitted to transfer to ICI, that is, to its organic plant, this lawsuit resulted in due course.

Now the court has determined that, as a matter of law, the defense of impossibility, or what is sometimes called the Doctrine of Impracticability, governs the disposition of this first claim. In this case, as a result of the change of ownership of the two plants, it simply became impossible for Rhone Poulenc to compel another

corporation to take its employees. It did what it could It assisted in facilitating the employees by furnishing them a form to indicate their desire to transfer, but there was simply no way that Rhone Poulenc could force another corporation to take the furnace plant employees.

Now in this respect, and I'm going to omit formal citations, it is well accepted, as stated in the Restatement of Contracts, and in this respect I quote, Where after a contract is made, a party's performance is made impracticable without his fault by the occurrence of an event the non occurrence of which was a basic assumption on which the contract was made his duty to render that performance is discharged, unless the language or circumstances indicate to the contrary.

Now a very down home but sensible illustration was made during the course of this trial in a series of questions put to one

of the witnesses, and the questions were to the effect, how could Rhone-Poulenc succeed in causing the transfer of these employees if the plant had been destroyed, or if a natural disaster had occurred and a giant crevice the result of an earthquake had opened up and swallowed it? The law recognizes that Rhone-Poulenc simply has no obligation under those circumstances. It is an occurrence of an event, the non occurrence of which was a basic assumption, that had taken place. Rhone-Poulenc would have no duty to rebuild ICI's plant so as to carry out the provisions of the transfer agreement. For this reason the court sustains the motion of the corporate defendants based upon the Doctrine of Impracticability and determines as a matter of law that Rhone-Poulenc was confronted with the circumstances that are evidenced in this record and that the fact that the two plants presently owned or were at the time that this

event occurred by two totally different independent employers is an event that rendered it impossible for Rhone-Poulenc to fulfill its obligation, and its obligation is excused and there is no breach of the contract. There being no breach of the contract on the part of the employer under the collective bargaining agreement, and the plaintiffs having failed on that prong, there is no need for the court to reach the question of whether there was a breach of fair representation. The duty of fair representation on the part of the union, is the other underpinning of the first claim, the 301 hybrid claim. The plaintiffs must prevail on both prongs of the claim, and if they fail on either, it renders moot the question of whether there was a breach on the part of the other.

Accordingly, I grant judgment as a matter of law to the defendants, the Rhone-

Poulenc defendants, and to the Local on the hybrid Section 301 claim.

Now the next claim that the plaintiffs make in this case is a claim against the local union, 912, with regard to an alleged breach of a duty of fair representation in negotiating out of the contract the cross bumping agreement from the collective bargaining agreement that governed the relationship between the members of the union and the company that owned the organic plant.

Now in this instance, the duty of fair representation is a statutory obligation created by federal law that imposes on the exclusive agent, that is, the union, as the statutory bargaining representative for the members of the union, a duty to represent all members of a designated unit by serving the interest of all members of the unit without hostility or discrimination toward any of the

members and to exercise its discretion with complete good faith and honesty and to avoid arbitrary conduct.

Those are the obligations of the statutory bargaining agent, the union, with regard to its duty of fair representation.

Now in this case the evidence reflects that in 1982 the membership of this union agreed to the division of the union into two bargaining units, and this was a decision of the membership of the union. And when the occasion arose to negotiate a contract with respect to the two plants, the members of the bargaining unit that was composed of the employees at each plant, through the democratic processes of the union organization, elected their own members to the bargaining committee and also instructed the bargaining committee as to the demand to be made. The proof in this case is undisputed that in each instance the bargaining committee

was given the power to approve and ratify the contract pursuant to the terms of the union constitution without referring the proposed contract back to the membership for approval by a vote of the membership.

Now Mr. Paley expressly confirmed that this was the practice, that it governed his election to the bargaining committee, the furnace plant bargaining committee in 1988. He confirmed that they were instructed by the demand to be made, and he also confirmed that members of that bargaining unit authorized his committee to adopt and approve the collective bargaining agreement without bringing it back to the members of that unit for their vote and approval. And Mr. Paley's testimony also confirms that this same process was established by the membership of the collective bargaining committee for the organic plant.

Now in this case the court has viewed the evidence according to the standard that is applicable and has determined that under the three-part test there is no evidence of any hostile or discriminatory action on the part of the union. These questions were put to the witnesses and they disavowed that there was any hostility or discrimination in the sense that those terms are commonly understood in this area. There was no suggestion that the members of the furnace plant unit were being punished or discriminated against because of any positions that they had taken, or any operation or effect of internal union politics. The court has also viewed the evidence under the applicable standard and is satisfied that there is no proof as would be required of a bad faith motive; that is, the union has a duty of acting in good faith. There is no evidence in this record of any bad faith motive.

After the change of the ownership of these companies took place of these plants, it became common knowledge that there might be problems presented, it was a matter widely discussed, the fact that a suit was filed in this court at one time that was subsequently dismissed attempting to obtain a declaration of the parties' rights was a fact that was well known There is nothing to suggest that there was something concealed; the fact that a problem hovered over the horizon was known, it was open, it was widely discussed, and there was also a widely felt concern as to the uncertainty that stemmed from the change in ownership. But the court finds, as the courts have said in other cases, that in this dynamic of labor management relations, there are going to be winners and losers, and so long as the actions of the union are not arbitrary in the sense that they are irrational, the fact that an unhappy result comes about doesn't give

rise to a sustainable claim of a breach of the duty of fair representation.

I am going to pause at this point. The suggestion has been made that in some fashion as a result of the 1982 agreement there was a guarantee of jobs. And I have are already alluded to that. That is not what that agreement provided. It provided very carefully a one-time right of transfer between plants under certain conditions and with certain consequences. And while there has been the suggestion implicit in this record that these plaintiffs feel that they have been stung wrongfully by being deprived of a job they thought they had for a lifetime, that is simply not the case. That agreement never purported to guarantee the existence of a job. And, as one court noted in another case, when people talk about having a job forever, forever in terms of labor management relations, means only until the next

collective bargaining agreement is negotiated, and it does not mean forever as forever until the end of time.

And I hold as a matter of law that the evidence in this case fails to make a submissable issue of a breach of the duty of fair representation with respect to -- of the removal or the preventing of the removal of the 1982 cross bumping agreement from the organic plant's collective bargaining agreement. That agreement was negotiated by a duly constituted negotiating committee, created and instructed in the usual and accepted fashion, and authorized to approve the results of the negotiations, the new agreement, and that there was no breach of the duty of fair representation on the part of the union in not taking steps to prevent that committee from negotiating its own collective bargaining agreement.

Accordingly, the Section 301 contract claim, 301 breach of the duty of fair representation in that respect, is dismissed.

Now the third claim is again a claim under Section 301 against the union, and this is what is called a constitutional claim, meaning a breach of contract claim based upon the Constitution of the International Union of Operating Engineers, which is a contract by its terms between the International Union and the local union, the members of the union being beneficiaries of that contract.

And the Supreme Court of the United States has relatively recently made explicit what other circuit courts have previously held, and that is that there is a claim under Section 301 for a breach of contract in the sense in which this claim is made, and the basis of this claim is the insistence by the plaintiffs that there was a breach of the Constitution or that is a breach of contract

on the part of the local union by excluding the plaintiffs from having the opportunity to vote on whether to delete the cross bumping agreement from the 1991 organic collective bargaining agreement.

The court determines that this claim is disposed of by the provisions of the International Union Constitution, the contract, in that Article XXIV, Subdivision 11 (e), dealing with contracts, provides "Proposed collective bargaining agreements and modifications thereof may be negotiated for local unions by the business manager, by a committee, by the local executive board, or by the business representative. Such agreements and modifications thereof shall not be executed until they have been presented at the next membership meeting following the negotiation of the proposed agreement and have been approved by the membership affected, provided, however, that a local union may

delegate to its local executive board or to its bargaining committee authority to approve such agreements and modifications without such submission of the same to the vote of its membership."

Now with respect to this claim, the court finds that this provision of Article XXIV, Subdivision 11, Section (e), was explicitly carried out in regular fashion and is reflected in the testimony in this case. The membership of the designated bargaining unit elected its own negotiating committee, instructed that negotiating committee with regard to the demands to submit in negotiations with the company and also expressly authorized that bargaining committee to approve such agreements without submission of the same to the vote of its membership.

The court holds that there was complete compliance with the provision of the International Constitution, which constitutes

a contract, the alleged breach of which is the basis for this claim. The contract was approved by a duly constituted bargaining committee, those members of the unit who were affected by it, and the court determines as a matter of law that this claim should be dismissed. The plaintiffs have failed to sustain the allegation of a breach of the Constitution, which constitutes a contract.

Now there is yet one other claim that was alleged by the plaintiffs, and this is the plaintiffs' claims against the International Union. The plaintiffs allege with regard to the International Union that the International Union breached its Constitution, which constitutes a contract, in two respects. First, it alleges a claim under Article VI of the Constitution that relates to the powers and duties of the general president, and specifically it alleges that there was a breach of Section 2 of Article VI;

Article VI is captioned To Review Cases And Interpret Laws, Et Cetera. Section 2, he shall review all cases, complaints and charges filed with the general executive board or the general secretary-treasurer. He shall be empowered to render decisions on the merits of such cases, complaints and charges and his findings on the facts shall be final and conclusive. He shall also be empowered to interpret the provisions of the Constitution and to decide questions of law arising thereunder. He shall be vested with all the administrative powers of the organization.

Now in this respect the plaintiffs claim that there was a breach of this provision of the Constitution, constituting a contract, because a request was made on the general president by a letter from Mr. Kincade for a decision with regard to certain matters arising out of this 1982 memorandum agreement when it became apparent what the prospects

were on the horizon as a result in the change of ownership of these two plants.

And Mr. Kincade wrote a detailed letter to the general president asking him for his opinion and decision in the matter, and the general president responded to that by stating that there was no proposed agreement or modification presently pending or presented to him for resolution. This letter was written in the summer, as I recall the evidence, of 1990. The collective bargaining agreement was in existence from 1988 to 1991 and the president, vested with the unlimited discretion under another provision of the contract, of the Constitution, exercised his discretion and judgment and stated that a decision was not called for because there was no actual proposed agreement or modification presented to him, in his words, quote, at this time, close quote.

The court finds that by virtue of the unlimited discretion vested in the general president that there was no breach of this agreement. His determination not to resolve the hypothetical question at that point was not totally irrational. It may well be that the court, this court or another court, might disagree with the decision of the president, and it is not to say that he could not have exercised his discretion differently and responded to the question put to him in a substantive fashion, but these are matters for resolution under the terms of the Constitution and it is not for the courts to substitute their judgment for the judgment of the union officials unless the action of the union officials are irrational and have no foundation.

And I find that given the unlimited discretion vested in the president, that his actions cannot fairly be characterized as

irrational and unfounded. It may well be unsatisfactory, but it does not constitute a breach of the agreement.

The second aspect of the claim against the International Union rests upon the claim of Article VI, Section 3 of the Constitution, which provides that, in substance, the president shall have full power to place the local ions and their officers and members under supervision. And in this respect the president received a letter from two of the plaintiffs, Mr. Nevette and Mr. Carroll, stating that they would appreciate anything that he could do for them asserting that their union, Local 912, seems to be working against their interest, and asked him to take steps so as to preserve the right of transfer.

Mr. Hanley, the president of the union, the evidence reflects, responded to that letter and held that having reviewed it

he determined that the agreements were entered into by the local union as the exclusive bargaining representative for the respective bargaining units and that the International Union was not a party to those agreements, and that the International Union would not intervene in the subject matter raised by Mr. Nevette and Mr. Carroll.

Now the court finds that it is unnecessary to address this claim because the plaintiffs conceded in argument during the motions in this matter that no claim was really being asserted under Article VI, Section 3; and the court further finds even without that, even without that concession, that no such claim is sustained by the evidence in this case.

Article VI, Section 3, upon which this claim is predicated, is captioned To Invoke and Administer International Supervision and Other Peremptory Powers. This

provision is the provision that authorizes an International Union consistent with federal labor law to take draconian measures when there is evidence of corruption or financial malpractice or to assure the performance of collective bargaining agreements, or where there has been a break down of the democratic process in order to restore democratic process to the workings of the local union. There simply is no evidence in this case upon which this issue could be sustained in favor of the plaintiffs. There is no evidence of corruption. There is no evidence of financial malpractice. There is no evidence of the break down of democratic procedures. And there is no basis for a claim for a breach of contract under Article VI, Section 3.

And, accordingly, that claim will be dismissed.

Now the court has recited its findings in considerable detail because it

thinks it is important that people who invoke the federal judicial process understand the reason for the disposition of the case. There are always going to be disappointments in litigation, not everybody can win, and this simply is a case that the court has determined that is not sustained as a matter of law, and for the reasons that I have articulated at some length, I wanted you to understand why the court has disposed of the cases under Rule 50 and granted judgment as a matter of law.

You have served faithfully, you have been an attentive jury, and you have discharged your functions in this case and you have served a purpose. You were the forum before whom these parties came, and at the beginning of this case there was no certainty as to whether or not you would be called upon to do your duty as the judges of the facts. It turned out after the plaintiffs have fully submitted their case that it was a case for

the court to decide as the judge of the law. So I have gone into this detail for your benefit so you won't feel that you have served no useful purpose. You were the forum before whom the claim was made. It has been determined now that there is not a claim to submit to you. Now you are discharged and excused in this case. You are not excused from all future jury service, just in this case. And you have the appreciation of the court for your faithful attendance and attention. You have done your duty and you are excused. Thank you very much. Let the jury step out.

(Jury discharged.)

THE COURT: The clerk is directed to enter judgment consistent with the court's findings stated on the record. The clerk is also directed to let the judgment reflect the dismissal of the case as to Stauffer Chemical Company pursuant to the statement of counsel

on the record, that it is agreed that it was agreed that any liability in this case of Stauffer had been assumed by the Rhone-Poulenc defendants and, accordingly, the parties agreed to dismiss the Stauffer Chemical Company. Judgment will be entered.

I compliment the lawyers. Once we got started, you drove right to the heart of it and there was no wasted effort and it was presented in a lawyerlike fashion. You have the compliments of the court.

Thank you very much.

Adjourn court, Marshal.

(Proceedings adjourned at 10:20 AM.)

IN THE UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF TENNESSEE
NASHVILLE DIVISION

JUDGMENT IN A CIVIL CASE

ALBERT AKINS, et al.	)
	)
	)
vs.	)CASE #: 1-91-0134
	)
ICI AMERICAS INC., et al.	)JURY DEMAND

The plaintiffs' action against the defendant, Stauffer Chemical Company, is dismissed with prejudice pursuant to the statement of counsel on the record at the hearing on October 19,1993.

The Court having granted the defendants' motions for judgment as a matter of law at the conclusion of the plaintiffs' case-in-chief, as stated on the record at the hearing on October 21, 1993, this action is, accordingly, dismissed with prejudice.

JULIET GRIFFIN, CLERK

/s SM
BY SUZANNE W. MATHERNE

DATE October 22, 1993

UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF TENNESSEE
COLUMBIA DIVISION

ALBERT AKINS, et al.,	)	
	)	
Plaintiffs,	)	
	)	**Civil Action No.**
vs.	)	**1-91-0134**
	)	**(Judge Higgins)**
ICI AMERICAS, INC., et al.,	)	**(Jury Demand)**
	)	
	)	
Defendants.	)	

ORDER

It appearing to the Court that plaintiffs William Claude, Milton Knowles, and Michael Lindsey signed releases and waivers and received severance pay from the defendant, Rhone-Poulenc Basic Chemicals Co., in accordance with the holding in the Court's June 29, 1993 Memorandum Decision and Order, those Plaintiffs' claims against Rhone-Poulenc, Inc. and Rhone-Poulenc Basic Chemicals Co. are hereby dismissed.

ENTERED this 27th day of October, 1993.

/s Thomas A. Higgins
UNITED STATES DISTRICT JUDGE

APPROVED FOR ENTRY:

/s William N. Ozier
William N. Ozier
Bennett L. Ross
BASS, BERRY & SIMS
2700 First American Center
Nashville, Tennessee 37238

CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing has been furnished by United States Mail, postage prepaid, to Frank Steiner, Esquire, 214 Second Avenue North, Suite 203, Nashville, Tennessee, 37201-1644; to George Barrett, Esquire, 217 Second Avenue North, Nashville, Tennessee, 37201-1601; and to C. Dewey Branstetter, Esquire, 200 Church Street, Nashville, Tennessee, 37201, on this 22 day of October, 1993.

/s William N. Ozier
William N. Ozier

238247

IN THE UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF TENNESSEE
COLUMBIA DIVISION

ALBERT AKINS, et al.	]	
	]	
v.	]	No. 1-91-0134
	]	Judge Higgins
ICI AMERICAS INC., et al.	]	

O R D E R

The Court has before it the plaintiffs' motion (filed October 28, 1993; Docket Entry No. 257) for new trial and the responses of the defendants, International Union (filed November 9, 1993; Docket Entry No. 259); Rhone-Poulenc, Inc., and Rhone-Poulenc Basic Chemicals Co. (filed November 10, 1993 Docket Entry No. 260) and Local Union 912 (filed November 15, 1993; Docket Entry No. 261).

After due consideration, the Court finds that the motion is not well taken and is hereby denied.

It is so ORDERED.

/s Thomas A. Higgins
Thomas A. Higgins
United States District Judge
12-29-93

No. 94-5132

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

ALBERT AKINS, ET AL.,	)	
	)	
Plaintiffs-Appellants,	)	
	)	
TONY BROCK, ET AL.,	)	
	)	
Plaintiffs,	)	
	)	
v.	)	ORDER
	)	
ZENECA, INC., ET AL.,	)	
	)	
Defendants-Appellees.	)	

BEFORE: CONTIE, MILBURN and SILER, Circuit Judges

The court having received a petition for rehearing en banc, and the petition having been circulated not only to the original panel members but also to all other active judges of this court, and no judge of this court having requested a vote on the suggestion for rehearing en banc, the petition for rehearing

has been referred to the original hearing panel.

The panel has further reviewed the petition for rehearing and concludes that the issues raised in the petition were fully considered upon the original submission and decision of the case. Accordingly, the petition is denied.

ENTERED BY ORDER OF THE COURT

/s Leonard Green
Leonard Green, Clerk pe

UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF TENNESSEE
COLUMBIA DIVISION

ALBERT AKINS, et al.,	)	
	)	
Plaintiffs	)	
	)	
v.	)	
	)	
ICI AMERICAS, INC.,	)	
RHONE-POULENC, INC.,	)	
RHONE-POULENC BASIC	)	Civil Action
CHEMICALS CO., STAUFFER	)	No. 1-91-0134
CHEMICAL COMPANY,	)	(Jury Demand)
INTERNATIONAL UNION OF	)	
OPERATING ENGINEERS,	)	
AFL-CIO, and LOCAL UNION	)	
NO. 912, INTERNATIONAL	)	
UNION OF OPERATING	)	
ENGINEERS, AFL-CIO,	)	
	)	
Defendants.	)	

SECOND PRETRIAL ORDER

This case will be tried and presented to the Court in accordance with this Order, the pleadings in the cause being amended to comply therewith.[1]

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[1]This order is limited to the liability issues remaining after entry of the Court's Memorandum Decision of June 29, 1993, granting in part and denying in part the defendants' summary judgment motions. None of the parties waive any previous position on its respective claims or defenses by entering into this Second Pretrial Order.

1. THEORIES OF THE PARTIES

a. THEORY OF THE PLAINTIFFS In a Memorandum Agreement identified with the date of September 13, 1982, Plaintiffs were promised a one time transfer right to the Organic Plant if they were ever laid off from the Furnace Plant. The Memorandum Agreement of September 13, 1982 was a cross-bumping agreement between the two plants. The two plants agreed to the cross-bumping agreement in exchange for the employees' promise to consent to separate collective bargaining agreements for the two plants which in the past had been under a single collective bargaining contract. The employees, including Plaintiffs, fully performed their part of the bargain, and since 1982 the plants have been under separate collective bargaining contracts.

The 1982 agreement was executed by Stauffer Chemical Company and Local Union No.

912, International Union of Operating Engineers, AFL-CIO. Subsequently, both plants were sold by Stauffer Chemical Company and at this time, the Organic Plant is owned by ICI and the Furnace Plant is owned by Rhone-Poulenc.[2]

Rhone-Poulenc is a successor to Stauffer Chemical Company and bound by the 1982 and 1985 collective bargaining agreements for the Furnace Plant, including the cross-bumping agreement. The cross-bumping agreement has been continuously in, and remains in, the collective bargaining agreement for the Furnace Plant as expressly agreed to by Rhone-Poulenc in the 1988 and 1991 collective bargaining agreements.

In June of 1990, Rhone-Poulenc announced the closing of the Furnace Plant with layoffs to begin in February of 1991. ICI, who was

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[2]Herein, Rhone-Poulenc refers to both Defendants, Rhone-Poulenc, Inc. and Rhone-Poulenc Basic Chemicals Co.

also a successor to Stauffer Chemical Company in relation to the Organic Plant, had agreed in 1988 to a collective bargaining agreement expressly incorporating and agreeing to the cross-bumping agreement. The 1988 collective bargaining agreement for the Organic Plant was scheduled to expire in June of 1991. Rhone-Poulenc postponed the layoffs until July of 1991.

In June of 1991, ICI and the Local Union representing the bargaining unit for the Organic Plant, agreed to delete the cross-bumping agreement from the collective bargaining contract for the Organic Plant. The new contract was not submitted to the bargaining unit for the Furnace Plant for approval nor was any member of that bargaining unit permitted to participate in the negotiations. The bargaining unit for the Furnace Plant, including the Plaintiffs, did not authorize, participate in or ratify the

negotiations of the June, 1991 contract for the Organic Plant.

The Furnace Plant has ceased production of phosphorus and Plaintiffs have been laid off or are facing layoff. Rhone-Poulenc has renounced and breached its contractual obligations to furnish Plaintiffs jobs at the Organic Plant under its collective bargaining agreements, including the cross-bumping agreement. Stauffer Chemical Company also breached its contractual obligations to Plaintiffs under the cross-bumping agreement.

The Local Union had a conflict of interest since 1982 in attempting to represent both bargaining units. To be able to collect dues from all employees in the face of such a conflict, the Local Union continually advised the Plaintiffs, up until June 11, 1991, the date of the new ICI contract, that the action of one bargaining unit could not affect the rights of the other bargaining unit. After

the approval of the June 11, 1991 contract, the Local Union changed its position and advised Plaintiffs that their rights had been terminated by the ICI bargaining unit.

Moreover, the Local Union refused to pursue a grievance against Rhone-Poulenc on behalf of Plaintiffs even though Rhone-Poulenc was clearly liable under its current collective bargaining agreement. The Local Union refused to pursue the grievance because if it won the grievance, it would injure the Organic Plant employees.

The Local Union breached its duty of fair representation to Plaintiffs. The Local Union further breached its contractual obligations to Plaintiffs under Section XXIV(11)(e) of the IUOE constitution which required the submission of the new June, 1991 ICI contract to the bargaining unit for the Furnace Plant for approval.

The International Union participated in the 1982, 1985 and 1988 negotiations and has had full knowledge of the conflict of interest situation since 1982. Moreover, by letter of June 26, 1990, the International Union was expressly apprised of the conflict of interest situation and requested, as authorized by Sections VI(2) and (5) of the IUOE constitution, to rule whether Section XXIV(11)(e) of the IUOE constitution would prohibit the bargaining unit of the Organic Plant negotiating away Plaintiffs' rights without the approval of the bargaining unit for the Furnace Plant. The International Union refused to act.

Again, on July 10, 1991, the International Union was fully apprised of the conflict of interest situation and the proposed grievances. The International Union was further informed on July 16, 1991 that the Local Union did not intend to pursue a

grievance against Rhone-Poulenc. Section VI(3) of the IUOE constitution authorizes the International Union to act to assure performance of collective bargaining agreements or other duties of a bargaining representative." Again, the International Union refused to act.

The International Union breached its contractual obligations to Plaintiffs under Section VI(2), (3) and (5) and XXIV(11)(e) of the IUOE constitution. The International Union and the Local Union were motivated by the conflict of interest situation and prejudicially favored the bargaining unit for the Organic Plant over the bargaining unit for the Furnace Plant.

b. **THEORY OF THE DEFENDANTS RHONE-POULENC, INC. AND RHONE-POULENC BASIC CHEMICALS CO.**

In September, 1982 the two facilities known as the Furnace Plant and Organic Plant located in Mt. Pleasant, Tennessee were both

owned by Stauffer Chemical Company ("Stauffer"). Prior to that time, all of the employees in both plants had been covered by the same collective bargaining agreement between Stauffer and Local 912 of the International Union of Operating Engineers ("Local 912"). In September of 1982, Stauffer agreed with Local 912 to divide the two plants into separate units for purposes of collective bargaining. Pursuant to that agreement Stauffer and Local 912 negotiated separate collective bargaining contracts for the two facilities which took effect in September, 1982. Stauffer and the Local Union also agreed to a separate memorandum agreement, which is actually undated but referred to in those contracts as the "September 13, 1982 Memorandum," which was incorporated by reference into both of those agreements. That Memorandum afforded certain employees of both plants, who had sufficient seniority and

skills, to "bump" or displace less senior employees in the other plant in the event of their lay off from either facility. Stauffer and Local 912 negotiated new contracts for both plants in 1985 which again incorporated the September 13, 1982 Memorandum. As the Court has already held, neither of those agreements has any continuing legal effect since both expired by their terms and were replaced by new agreements in 1988.

After a series of changes in ownership beginning in 1985, both facilities were owned in 1987 by ICI Americas, Inc. The defendant, Rhone-Poulenc, Inc. (hereinafter referred to as "RP") purchased the facility known as the Furnace Plant in Mt. Pleasant, Tennessee, and several other facilities unrelated to this action, from ICI Americas, Inc. (hereinafter referred to as "ICI") in December of 1987 by purchasing all of the stock of Stauffer. ICI retained ownership of the organic Plant and

certain other assets of Stauffer. The name of Stauffer Chemical Company was changed by RP to Stauffer Chemical Company Division of Rhone-Poulenc, Inc. in February of 1988 and, in September of 1989, the name was changed once more to Rhone-Poulenc Basic Chemicals Co. (hereinafter referred to as "RP Basic"). (The defendants RP and RP Basic are sometimes referred to herein collectively as "RP".)

Contrary to the position asserted by the plaintiffs, there is no longer any entity known as Stauffer Chemical Company. Through the acquisition of the Stauffer stock by RP and the subsequent name changes, Stauffer became RP Basic.

RP admits that the plaintiffs, and all of the other production and maintenance employees of the former Stauffer Chemical Company have been represented at all times material to this case by the defendant Local 912. Local 912 entered into a series of collective bargaining

agreements with Stauffer, and subsequently in 1988 and 1991 with ICI and RP Basic. The 1982 Memorandum which is the basis of the plaintiffs' claims was also incorporated by reference in the contracts entered into between ICI and Local 912 and between RP Basic and Local 912 in 1988. In June of 1991, after extensive negotiations, ICI and Local 912 reached agreement on a new contract which removed any reference to the 1982 Memorandum. That collective bargaining agreement took effect on June 11, 1991.

Since the plaintiffs had no "vested" transfer rights under the 1982 Memorandum, any right to transfer which the Plaintiffs may have had did not arise until they were actually laid off from the Furnace Plant after July of 1991. It is the position of the RP Defendants that once the Furnace Plant and the Organic Plant were owned by separate and independent corporate entities after December

of 1987, the 1982 Memorandum was no longer effective or binding on either ICI or the RP Defendants since neither company could force the other company to accept a transfer of its laid-off employees. Even if the 1982 Memorandum did continue to be binding on ICI and RP after 1987, the removal of the 1982 Memorandum from the ICI contract in June of 1991 ended any basis on which the plaintiffs may have had a claim to transfer to the ICI Organic Plant at the time of their layoffs by RP Basic. Once the 1982 Memorandum was eliminated from the ICI contract, ICI had no further obligation to accept the transfer of any of the plaintiffs and neither RP nor Local 912 had any way to force ICI to accept such transfers.

The RP Defendants assert that they performed any and all obligations which they had to the Plaintiffs under the 1988 collective bargaining agreement between RP

Basic and Local 912 which was in effect at the time of their layoffs in 1991. The RP Defendants assert that nothing contained in that 1988 collective bargaining agreement between RP Basic and Local 912, or in the 1982 Memorandum, constitutes an agreement by the RP Defendants to "furnish" the plaintiffs jobs at the Organic Plant owned by ICI and that there is no way that RP could have made such an agreement. The RP Defendants assert that whatever effect the 1982 Memorandum may have had at the time of the layoff of the Plaintiffs beginning in July of 1991, the sole obligation which the RP Defendants had under their own contract with Local 912 was to permit the Plaintiffs to transfer to the ICI Organic Plant when they were laid off by RP, or to accept the transfer of any employees with sufficient seniority and qualifications who might have been laid off from the ICI Organic Plant, displacing less senior Furnace

Plant employees. The RP Defendants deny that they "renounced" or breached any contractual obligations which they may have had to the plaintiffs but contend that they fulfilled their obligation to the plaintiffs by attempting to assist them in seeking to transfer to the ICI Organic Plant after they were laid off from the Furnace Plant beginning in July of 1991. When ICI refused to accept the plaintiffs, the RP Defendants assert that they had no ability to force ICI to accept the plaintiffs, nor could they have done so since, as the Court has now held, any obligation ICI may have had to accept them ended when the 1982 Memorandum was removed from the ICI contract with Local 912 in June of 1991.

The RP Defendants also contend that in order for any of the plaintiffs to assert any contractual right to transfer against them, they must show that they exhausted the grievance and arbitration procedure contained

in the contract between RP Basic and Local 912. Since only four of the plaintiffs filed a grievance under that contract, only those four individuals can raise the claim in this action that the RP Defendants breached a contractual obligation to them. The RP Defendants responded to that grievance by offering to assist the four grievants and any other employees being laid off from the Furnace Plant in attempting to transfer to the Organic Plant. After receiving the company's response to that grievance, and with advice of its attorney, the local union discontinued any further processing of that grievance. RP never refused to process the grievance or refused a request to arbitrate the grievance since no such request was made by Local 912.

The RP Defendants also assert that in the negotiations between RP Basic and the defendant Local Union in October of 1988--the first negotiations between RP and the union

after RP's purchase of the Furnace Plant -- the parties agreed to a memorandum dated October 13, 1988 which clarified that RP Basic had no obligation to take any affirmative action to try to assist any of its employees, including the plaintiffs, in attempting to transfer to the ICI Organic Plant under the 1982 Memorandum. That October 13, 1988 Memorandum, which was also incorporated by reference in the 1988 and 1991 contract between RP and Local 912, provided that in the event of a layoff of its employees, including the plaintiffs, the sole obligation of the RP Defendants was to follow the terms of the collective bargaining agreement then in effect between RP Basic and Local 912, or the terms of the 1982 Memorandum as incorporated in that contract. The RP Defendants assert that they complied fully with all of such provisions and had no further obligation to the Plaintiffs once they had been laid off by RP Basic. The

Plaintiffs have no valid claim against RP because of ICI's justified refusal to accept their transfer requests.

The RP Defendants also assert that neither the defendant International Union nor the defendant Local Union breached any duty which either of those entities had to represent the plaintiffs fairly and that barring such breach of the duty of fair representation by one or both of the union defendants, the plaintiffs can assert no claim for breach of the terms of the collective bargaining agreement between RP and Local 912 against the RP Defendants.

c. THEORY OF THE DEFENDANT, LOCAL 912 INTERNATIONAL UNION OF OPERATING ENGINEERS.

By order dated 6/29/93, this Court has granted judgment as a matter of law to Local 912 on all claims by any plaintiff under the LMRDA (29 U.S.C. § 411), all pendent state law claims and all but one Section 301 claim under

the LMRA. Therefore, these matters are no longer before the Court and evidence thereon is not admissible at trial.

There are two claims against Local 912 which have not been dismissed by the Court: (1) The claim that Local 912 breached its duty of fair representation; and (2) The claim that Local 912 breached Section XXIV(11)(e) of the IUOE constitution.

Plaintiffs allege only two specific actions as violations of the duty of fair representation: (1) That the union breached its duty by not preventing the separate bargaining unit's negotiating committee at ICI from approving its own 1991 contract, which contract did not include the 1982 Memorandum of Understanding; and (2) That the union breached its duty by not pursuing a grievance filed by four of the plaintiffs against Rhone-Poulenc to the fourth and final grievance stage even though the union had determined

that all possible remedies were had at the third stage.

Concerning the contract claim, it is the position of Local 912 that plaintiffs cannot establish a violation of the constitution as Local 912 complied with the proviso contained in the very sentence which plaintiffs allege to have been violated. Article XXIV(11)(e) provides for contract approval "by the membership affected", then continues with an express exception to that requirement:

> ... membership affected, provided, however, that a Local Union may delegate to its Local Executive Board or to its bargaining committee authority to approve such agreements and modifications without such submission of the same to vote of its membership.

Local 912 denies that the plaintiffs, members of the Rhone-Poulenc bargaining unit, qualify as members affected by a contract covering employees in the separate ICI bargaining unit. However, even if these plaintiffs are considered members affected,

the union complied with the express grant of the constitutional provision by delegating to a bargaining committee the authority to approve such contract "without such submission of the same to vote of its membership." Plaintiffs can never establish a violation of a contract provision where the local union has complied with an exception expressly stated in the words of that contract provision. Plaintiffs have failed to state and under the admitted facts can never prove a Section 301 claim for violation of Article XXIV(11)(e) of the IUOE constitution.

It is also the position of Local 912 that the plaintiffs cannot establish a breach of the duty of fair representation as to the two categories alleged, contract negotiations involving another bargaining unit and a grievance resolution in the plaintiffs' bargaining unit.

Plaintiffs, members of the Rhone-Poulenc bargaining unit, have alleged that Local 912 breached its duty of fair representation to them by allowing employees of a separate corporation, ICI, to delete the 1982 memorandum from ICI's contract which covered only ICI's separate bargaining unit. As a matter of law, this allegation does not constitute a breach of the duty of fair representation. It is an undeniable fact that Local 912 owed the duty of fair representation to its ICI bargaining unit. It is further undisputed that the ICI employees wanted the memorandum taken out of their contract because they did not want anything in their contract which might allow the employees of the closing Rhone-Poulenc plant to take their jobs. The mere fact that Local 912 represents another unit, ICI, which exercises its conceded right to bargain for and accept a contract which protects its own unit's jobs, does not state a

breach of the duty to a different unit. To hold otherwise would constitute a requirement that Local 912 breached its duty as to its ICI unit in order to fulfill an alleged duty to plaintiff's unit. Federal labor law neither recognizes nor countenances such a requirement. Plaintiffs have conceded that they had no right to vote on the provisions of the contract for the other bargaining unit, ICI.

In addition to there being no legal basis for plaintiffs' fair representation claim, there is also no factual basis because Local 912 did not have the authority to determine what contract clauses went into the ICI contract. The members of Local 912 at ICI had a bargaining committee which was empowered by the constitution to negotiate for and accept a contract with ICI on behalf of the bargaining unit employees at ICI. Officials of Local 912 were not voting members of that

bargaining committee. When the company, ICI, proposed to delete the memorandum from the ICI contract, the ICI bargaining committee was the only entity which could accept or deny that company proposal. Because the ICI employees had already expressed their desire to delete that memorandum in order to protect their own jobs, the ICI bargaining committee exercised their authority to agree to that deletion. As plaintiffs have conceded, there was nothing Local 912 could do to stop the negotiating committee from agreeing to remove that provision from the 1991 ICI contract. Local 912 cannot be found to have acted arbitrarily, capriciously or in bad faith when in fact the Local had no power to act at all. Under duty of fair representation law and the facts conceded by plaintiffs, plaintiffs have failed to state a claim for breach of the duty of fair representation concerning another unit's contract.

Neither do plaintiffs state a breach of the duty of fair representation in their claim that Local 912 did not obtain the relief desired by the four Rhone-Poulenc employees who filed the grievance against their employer. Plaintiffs have conceded that the union processed this grievance through all three steps of the grievance procedure and that the grievance was discontinued only at the fourth and final step. The grievance was an attempt to compel Rhone-Poulenc to force another company, ICI, to hire the employees of Rhone-Poulenc who had been laid off. The facts of this case reveal that Rhone-Poulenc resolved this grievance by implementing the procedures available to it to place laid off Rhone-Poulenc employees at ICI. Because Rhone-Poulenc had done everything within its power to accomplish what the grievance demanded, and because counsel advised Local 912 that nothing further in fact could be

done, Local 912 determined that the grievance was resolved at the third step, thereby withdrawing it from further-processing.

Under the facts admitted by all parties in this case, plaintiffs cannot meet their burden in the duty of fair representation charges to show that the union's actions, viewed from the legal and factual setting in which they occurred, were so far outside a wide range of reasonableness as to be irrational. It is not the burden of Local 912 to establish that its actions were rational but the proof requirements of the plaintiffs to establish that the actions of the union were so far outside a wide range of reasonableness as to be irrational. This the plaintiffs cannot establish and their case should be dismissed.

It is Local 912's position that since plaintiffs cannot establish a breach of the duty of fair representation, their entire duty

of fair representation/§ 301 case must fail. It is also Local 912's theory that whether or not a breach of the duty of fair representation is proved against it, the plaintiffs cannot establish a breach of the contract with Rhone-Poulenc defendants. Failure to establish a breach of contract as a matter of law requires dismissal of both the breach of contract action and its hybrid partner, the duty of fair representation case.

d. **THEORY OF THE DEFENDANT INTERNATIONAL UNION OF OPERATING ENGINEERS.**

The defendant, International Union of Operating Engineers, AFL-CIO (hereinafter referred to as the "International"), is a labor organization pursuant to 29 U.S.C. § 402. The Court has already held that:

(1) the International is a separate body from Local 912;

(2) the International is not the bargaining representative of the plaintiffs;

(3) the International does not owe a duty of fair representation to the plaintiffs;

(4) the International did not participate in or ratify any of the representation by Local 912 complained of by plaintiffs;

(5) the International did not tortiously interfere with any contract entered into by plaintiffs; and

(6) the International did not conspire with any of the defendants.

The remaining causes of action against the International are whether the General President of the International violated the constitution when he responded to Local 912 Business Manager Kincade's letter of June 26,

1990 and whether the General President violated the constitution when he responded to two of the plaintiffs' letter dated July 12, 1991.

The International admits that the business manager of Local 912 requested an interpretation of the International's constitution in his letter dated June 26, 1990. The General President of the International is empowered under Article VI, Section 2 of the International Constitution to interpret the Constitution. Specifically, the Business Manager described a memorandum of agreement which had been in effect for some time and which was then contained in separate collective bargaining agreements IUOE Local 912 had with ICI Americas and Rhone-Poulenc, Inc., respectively, covering separate groups of employees. The Business Manager asked whether either separate group of employees could do away with the memorandum, since in

his opinion "the Membership Affected includes both entities."

The Business Manager's Letter requested the General President's interpretation of Article XXIV, Subdivision 11, Section (e) of the International Constitution. That section of the Constitution states that "Proposed collective bargaining agreements and modifications thereof" are to be approved by the "membership affected", provided that a Local Union "may delegate to its Local Executive Board or to its bargaining committee authority to approve such agreements and modifications without such submission of the same to vote of its membership." In his response, the General President stated that, because the memorandum of agreement was in effect and there was no currently proposed modification to that memorandum or to either agreement, there was no need to determine "at this time" what set of members constituted the

"membership affected" that would be entitled to vote on a proposed modification of that agreement.

The General President's response that the question was not ripe for a decision was proper under the circumstances. After the Local Business Manager's request in 1990, neither he nor any other member of Local 912 requested an opinion of the General President at any point when there was an actual proposed modification of the memorandum under consideration. Moreover, under the authority granted Local 912 under the proviso to Article XXIV, Subdivision 11, Section (e), Local 912 had delegated the authority to approve modifications to the agreements to the bargaining committees for each unit. Hence, members in neither bargaining unit had any right, under the International Constitution, to vote on the modification, without regard to whether or not they were considered to be the

"membership affected" by the proposed modification. Thus, the General President's response to Local 912's Business Manager did not constitute a violation of the International Constitution by the International Union.

The International denies that it violated Article VI, Section 3 of the Constitution in its response to two of the plaintiffs' 17 letter. After receiving the plaintiffs' letter, the General President requested a report from the Local 912 Business Manager on the items discussed in the letter. Upon receiving the report, the General President responded to the plaintiffs, stating that since the International was not a party to any of the agreements mentioned by the plaintiffs, the International was without authority to alter or amend the terms of the agreement or intervene in the manner described in their letter. This response complied with the

General President's usual practice when he is asked to intervene in a local collective bargaining matter.

The General President's response to the plaintiffs' letter was entirely proper. Specifically, the International did not have the authority to simply force Local 912 to process the grievance mentioned in the plaintiffs' letter. Under Article VI, Section 3 of the International Constitution, the General President does have the authority, under certain enumerated circumstances, to place a Local Union under International supervision (trusteeship), thereby suspending the Local's autonomy entirely and completely taking over the operation of the Local's affairs. Before exercising this authority, the Constitution requires, in all but emergency circumstances, that a hearing be held with reasonable notice to officers and members of the local involved. The authority

to place a Local Union under trusteeship is discretionary authority and, even if the conditions described in the Constitution for exercising this discretionary authority are met, there is absolutely no mandatory obligation under the Constitution for the General President to exercise this authority.

No plaintiff ever suggested that Local 912 should be placed under trusteeship, nor did President Hanley consider such. Even if the letter of July 12, 1991 from two of the plaintiffs could be considered an appeal to the General President to place Local 912 under trusteeship, such letter did not meet the requirements of the Constitution to place Local 912 under trusteeship, nor did the conditions at Local 912 satisfy the strict requirements for placing a local union under trusteeship as provided in 29 U.S.C. § 462 and in the International Constitution.

Federal law does not favor trusteeships, as can be seen from 29 U.S.C. § 462 which states:

> Trusteeships shall be established and administered by a labor organization over a subordinate body only in accordance with the constitution and bylaws of the organization which has assumed trusteeship over the subordinate body and for the purpose of correcting corruption or financial malpractice, assuring the performance of collective bargaining agreements or other duties of a bargaining representative, restoring democratic procedures, or otherwise carrying out the legitimate objects of such labor organization.

The International can place a local union under trusteeship only after complying with the federal statute and the rules and regulations of the Secretary of Labor made pursuant to federal law, which include the holding of a hearing prior to imposing such trusteeship.

Not only did the conditions at Local 912 not warrant the imposition of a trusteeship,

the General President is given great discretion by the International Constitution in the execution of his powers and Article VI, Article 3 of the International Constitution specifically states that:

> Failure of the General President to exercise the authority vested in him under this section shall not in itself be considered as authorization for, or ratification or condonation of, any act or failure to act on the part of any Local Union or other subdivision of the International Union, or their officers, employees, members or agents.

Thus, the General President's response to the plaintiffs' letter was entirely appropriate and did not constitute a breach by the International Union of the International Constitution.

2. **ISSUES**

a. **AGREED STATEMENT OF LEGAL ISSUES**

1. Whether Local Union 912 breached its contractual obligations to

Plaintiffs under Section XXIV(11)(e) of the IUOE constitution.

2. Whether the International Union breached its contractual obligations to Plaintiffs under Section VI(3) of the IUOE constitution.

3. Whether the International Union breached its contractual obligations to Plaintiffs under Section VI(2) of the IUOE constitution.

b. DEFENDANTS' PROPOSED ISSUES

1. Whether Rhone-Poulenc breached contractual obligations to Plaintiffs under the 1988 and 1991 collective bargaining agreements for the Furnace Plant.

2. Whether the Defendant, Local Union 912, breached its duty of fair representation to Plaintiffs under the 1988

and 1991 collective bargaining agreements between Rhone-Poulenc and Local 912.[3]

c. **PLAINTIFFS' PROPOSED ADDITIONAL ISSUES.**

The parties have been unable to agree with the following additional issues proposed by the plaintiffs. By signing this order the defendants assert that the issues are as stated in Sections 2a and 2b and do not agree to the inclusion of the issues in this section 2c which are left for the court to resolve at the pretrial conference.

1. Whether Rhone-Poulenc breached contractual obligations to Plaintiffs under the 1988 and 1991 collective bargaining agreements for the Furnace Plant and under the September 13, 1982 memorandum agreement.

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[3]These issues were agreed to on Friday, September 24, 1993 in a meeting of the attorneys for the parties. By fax sent on Monday, September 27, plaintiffs' attorney proposed changes to the issues which are set forth in plaintiffs' proposed issues.

2. Whether the Defendant, Local Union 912, breached its duty of fair representation to Plaintiffs under the applicable collective bargaining agreements and under the memorandum agreement of September 13, 1982.

3. Whether Stauffer Chemical Company breached contractual obligations to Plaintiffs under the applicable collective bargaining agreements and under the memorandum agreement of September 13, 1982.

4. Whether defendant International Union breached its contractual obligations to plaintiffs under Sections VI(5) and XXIV(11)(e) of the IUOE Constitution.

3. **OTHER MATTERS**

a. Counsel have complied with the requirements of Local Rule 11 as to witnesses, exhibits and stipulations. Copies of Proposed Witness Lists are attached. The parties stipulate to the authenticity of all exhibits.

b. The first phase of this trial will be limited to liability issues pursuant to the Agreed Order of bifurcation.

ENTERED this 30th day of September, 1993.

Any statement of the issues in this order are subject to the Court's memorandum and order of July 29, 1993, which shall govern the trial of this case. TAH

/s Thomas A. Higgins
THOMAS A. HIGGINS
UNITED STATES DISTRICT JUDGE

APPROVED FOR ENTRY:

STEINER & STEINER

BY: _____

Frank Steiner
Attorney for Plaintiffs
214 Second Avenue North
Suite 203
Nashville, Tennessee 37201-1644
615/244-5063

BASS, BERRY & SIMS

BY: /s William N. Ozier
William N. Ozier
Attorneys for Rhone-Poulenc, Inc.
and Rhone-Poulenc Basic Chemicals Co.
2700 First American Center
Nashville, Tennessee 37238
615/742-6232

BRANSTETTER, KILGORE, STRANCH & JENNINGS

BY: /s C. Dewey Branstetter, Jr.
C. Dewey Branstetter, Jr.

BY: /s Jane B. Stranch
Jane B. Stranch
Attorneys for Local Union 912,
the International Union of
Operating Engineers
200 Church Street
Nashville, Tennessee 37201
615/254-8801

BARRETT, JOHNSTON & PARSLEY

BY: /s George E. Barrett
George E. Barrett

BY: /s Phillip A. Purcell
Phillip Purcell
Attorneys for International
Union of Operating Engineers,
AFL-CIO
217 Second Avenue North
Nashville, Tennessee 37201-1601
615/244-2202

IN THE UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF TENNESSEE
COLUMBIA DIVISION

ALBERT AKINS, ET AL.,	)
	)
Plaintiffs,	)
	)
v.	) CIVIL NO.1-91-0134
	) (JUDGE HIGGINS)
ICI AMERICAS INC., ET AL.,	) JURY DEMAND
	)
Defendants.	)

MOTION OF GENEVA WIGGINS TO JOIN THIS ACTION AS A PLAINTIFF

Geneva Wiggins respectfully moves the Court to permit her to join this action as a party/plaintiff. Her Consent to Join is attached hereto. Her situation is the same as the Plaintiffs herein and she has the same claims they have.

Paragraph (b) of the Scheduling Order provides that Motions for Joinders shall be filed by June 1, 1992, except for joinders authorized by the Court, if any, in response

to Plaintiffs' Motion to Notify Class Members.[1] Since Ms. Wiggins' claims are identical to the claims of the present Plaintiffs, there would be no prejudice in permitting the joinder at this date.

Respectfully submitted,

STEINER & STEINER

BY: /s Frank Steiner
Frank Steiner
Attorney for Plaintiffs
TN Supreme Court No. 3600
214 Second Avenue North
Suite 203
Nashville, TN 37201-1644
(615) 244-5063

ORDER

Motion granted and Ms. Wiggins is herewith deemed a party plaintiff.

/s Thomas A. Higgins
USDJ/7-23-92

[1]The Motion is primarily under the ADEA and Plaintiffs have moved to dismiss the ADEA claims. However, the Plaintiffs and the other employees also comprise a Rule 23 class.

IN THE UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF TENNESSEE
COLUMBIA DIVISION

ALBERT AKINS, ET AL.,	)
	)
Plaintiffs,	)
	)
v.	) CIVIL NO.1-91-0134
	) (JUDGE HIGGINS)
ICI AMERICAS INC., ET AL.,	) JURY DEMAND
	)
Defendants.	)

PLAINTIFFS' MOTION TO AMEND TO DISMISS AGE DISCRIMINATION CLAIMS

Pursuant to Rule 15(a) of the Federal Rules of Civil Procedure, Plaintiffs respectfully move to amend to dismiss the age discrimination claims.

Respectfully submitted,

STEINER & STEINER

BY: /s Frank Steiner

Frank Steiner
Attorney for Plaintiffs
TN Supreme Court No. 3600
214 Second Avenue North
Suite 203
Nashville, TN 37201-1644
(615) 244-5063

CERTIFICATE OF SERVICE

I hereby certify that a true and exact copy of the foregoing Motion for Amend to Dismiss Age Discrimination Claims has been mailed, postage prepaid, to Cary Schwimmer, Esq., Young & Perl, P.C., 2380 One Commerce Square, Memphis, Tennessee 38103, William N. Ozier, Bass, Berry & Sims, 2700 First American Center, Nashville, Tennessee 37238, C. Dewey Branstetter, Jr., Esq., Branstetter, Kilgore, Stranch & Jennings, 200 Church Street, Nashville, Tennessee 37201 and to George E. Barrett, Esq., Barrett, Johnston & Parsley, 217 Second Avenue North, Nashville, Tennessee 37201-1601, this 5th day of May, 1992.

/s Frank Steiner
Frank Steiner

ORDER

Motion granted and all claims of age discrimination are dismissed.

/s Thomas A. Higgins
Thomas A. Higgins
USDJ/8-28-92

91053M18

UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF TENNESSEE
COLUMBIA DIVISION

ALBER AKINS, et al.	]	
	]	
v.	]	No. 1-91-0134
	]	Judge Higgins
ICI AMERICAS INC., et al.	]	

O R D E R

The Court has before it the motion (filed March 19, 1992; Docket Entry No. 70) of plaintiffs to notify class members, together with an amended form (filed September 2, 1992; Docket Entry No. 124) of notice.

Also before the Court are motions of Stephen Harville (filed August 18, 1992 Docket Entry No. 114?, Erma Fitzgerald (filed August 27, 1992; Docket Entry No. 117), Sylvester Kirk, Jr. (filed September 2, 1991; Docket Entry No. 123), and Robert D. Dawson (filed September 4, 1992; Docket Entry No. 128) to join this action as additional parties.

This is not a class action. The plaintiffs have not alleged the prerequisites

to a class action, as set forth in Federal Rule of Civil Procedure No. 23(a), nor have they complied with Local Rule of Court No. 15. Accordingly, the plaintiffs' motion to notify class members is denied.

The scheduling order (entered February 28, 1992; Docket Entry No. 59) requires that motions for joinder of parties be filed by June 1, 1992. The above-listed motions to join were all filed well after that date. The movants have not shown cause why the deadline should be extended, as required by Federal Rule of Civil Procedure No. 6(b). Accordingly, the above-listed motions to join are denied.

It is so ORDERED.

/s Thomas A. Higgins
Thomas A. Higgins
United States District Judge
6-28-93

IN THE UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF TENNESSEE
COLUMBIA DIVISION

ALBERT AKINS, ET AL.,	)
	)
Plaintiffs,	)
	)
v.	) CIVIL NO. 1-91-0134
	) (JUDGE HIGGINS)
ICI AMERICAS INC.,	)
ET AL.,	) JURY DEMAND
	)
Defendants.	)

MOTION TO REVIVE ON SUGGESTION OF DEATH OF PLAINTIFF, TERRY THOMASON

Kathy G. Thomason states she is the widow of the Plaintiff, Terry Thomason, who died on September 30, 1993, and she has qualified as the Administratrix of his estate. (Certified copy of order appointing her Administratrix is attached.) Accordingly, Kathy G. Thomason moves the Court to revive his action in this matter in her name pursuant to T.C.A. §§ 20-5-102 and 20-5-106.

Respectfully submitted,

/s Frank Steiner
Frank Steiner #3600

Attorney for Plaintiffs
STEINER & STEINER
214 Second Avenue North
Suite 203
Nashville, TN 37201-1644
(615) 244-5063

ORDER

Motion granted and the administratrix is so substituted.

/s Thomas A. Higgins
Thomas A. Higgins
USDJ/10-27-93

LIABILITIES OF AND RESTRICTIONS ON LABOR AND MANAGEMENT

29 USCA § 185, Suits by and against labor organizations

(a) Venue, amount, and citizenship

Suits for violation of contracts between an employer and a labor organization representing employees in an industry affecting commerce as defined in this chapter, or between any such labor organizations, may be brought in any district court of the United States having jurisdiction of the parties, without respect to the amount in controversy or without regard to the citizenship of the parties.

(b) Responsibility for acts of agent; entity for purposes of suit; enforcement of money judgments

Any labor organization which represents employees in an industry affecting commerce as defined in this chapter and any employer whose activities affect commerce as defined in this

chapter shall be bound by the acts of its agents. Any such labor organization may sue or be sued as an entity and in behalf of the employees whom it represents in the courts of the United States. Any money judgment against a labor organization in a district court of the United States shall be enforceable only against the organization as an entity and against its assets, and shall not be enforceable against any individual member or his assets.

(c) Jurisdiction

For the purposes of actions and proceedings by or against labor organizations in the district courts of the United States, district courts shall be deemed to have jurisdiction of a labor organization (1) in the district in which such organization maintains its principal office, or (2) in any district in which its duly authorized officers

or agents are engaged in representing or acting for employee members.

(d) Service of process

The service of summons, subpena, or other legal process of any court of the United States upon an officer or agent of a labor organization, in his capacity as such, shall constitute service upon the labor organization.

(e) Determination of question of agency

For the purposes of this section, in determining whether any person is acting as an "agent" of another person so as to make such other person responsible for his acts, the question of whether the specific acts performed were actually authorized or subsequently ratified shall not be controlling.

NOTICE OF INTENT

The Memorandum of Agreement, dated 09/11/82, between the Company and the Union, states in part:

2. Employees shall first exhaust their rights under the layoff procedures described in the collective bargaining agreement covering the plant to which they are assigned.

3. Employees of either plant covered by this memorandum of Agreement who are to be laid off from their plant may then displace junior employees in the other plant provided that:

   a. the employee displaced shall be the junior employee in the classification.

   b. The employee must qualify for such classification after a reasonable training period at the Organic Plant or a period of fifteen (15)

working days or less at the Furnace Plant. If the employee fails to qualify, he will not be allowed to make further choices of jobs, but rather will be laid off.

4. Employees who elect to move from one plant to another will become an employee of the plant to which they have moved and will have no further rights to return to the other plant.

5. Employees who are given the opportunity to exercise their rights under this Memorandum of Agreement and who decline to do so shall forfeit future rights under this Agreement.

I have read the provisions outlined above and elect to do the following:

Check one:

____ I waive my rights to move to the Organic Plant.

____ I hereby exercise my rights to move to the Organic Plant.

_____
Signed Date

_____
Witness

(LOGO)

INTER-OFFICE CORRESPONDENCE Houston-212

TO: LOCATION: Shelton

FROM: G. L. Suydam 9/13/88

ATTENTION: J.P. Tullsen

SUBJECT: Cross Bumping Agreement

COPY TO: D. T. Sutton

RECEIVED

SEP 14 1988

HUMAN RESOURCES

I reviewed the cross bumping agreement with Bob Stringer, Personnel Manager at the ICI plant. He was very helpful and knowledgeable.

- The applicable agreement is the one which was reviewed by M. M. Pattillo. A second agreement pertaining to Tapper's 1st Helper or Proportioning Man is not applicable. According to Stringer,

the fourteen employees involved in the second agreement have all either exercised or waived their rights.

- The affected employees are more numerous than I imagined. Bob prepared the list attached 10/9/87. It is a combined seniority list of the two plants which showed 154 furnace plant employees and 117 organic plant employees as potentially having the seniority described in the agreement. On today's Furnace Plant Seniority list there remain 135 employees with the seniority described in the agreement.

This list was compiled by Stringer, discussed and confirmed at the time

with Lorne O'Connor, former Furnace Plant Personnel Manager and kept as a confidential internal document at the organic plant.

- I have tried to analyze four positions relative to this problem.

  1. Do nothing -- This position relies on the two principles that neither company considers the cross bumping agreement as enforceable and if contested the resolution of the problem will be smaller in the future than it will be today. As we have discussed, the liability, if any, rests with the Company that lays off and cannot force the remedy of the

Agreement on the opposite Company. Therefore, our worst case scenario would be a plant closure. In that scenario we would have to give the newly legislated 60-day notice, negotiate terms for closing and also negotiate resolution to the cross bumping agreement. In that we would not be able to provide the jobs it calls for, a monetary solution would likely result either through negotiation, arbitration or litigation.

2. Negotiate the Agreement out - - If the cross bumping agreement represents a significant liability to the

Company it then must also represent a significant asset to the employees. We must be resolved to make a monetary offer or severance arrangement to compensate this difference if negotiations are to be successful.

3. Negotiate and fail - pre strike -- If the Company raises the issue and capitulates as ICI did in January, we will have reduced our future argument that the agreement cannot be enforced. ICI verbally disclaimed their acquiescence but nevertheless signed the existing agreement.

4. Negotiate and Strike -- If the parties cannot make an agreement because of differences over this issue and a strike ensues, we will have to resolve these issues to end the strike or survive the strike. Resolving these issues while at strike might pose the same considerations as would be present under number one Do nothing if it ever occurred, except we will face the maximum liability. Surviving the strike would require an indefinite unilateral operation of the plant.

Recommendations

1. Do nothing

2. If we are not comfortable with doing nothing, I would propose to resolve the problem by having the union resolve to our satisfaction several questions about these agreement. This position is short of all or nothing and allows that we do owe something, perhaps severance pay for those affected employees.

a. What would the union have us to do if we are ever required to administer this agreement?

b. Do employees in the respective plants still earn seniority in the

opposite plant or does their seniority diminish one year for each year that passes?

c. Does the Union expect us to displace our own employees with employees of ICI if ICI lays off employees?

d. Would the Union negotiate away their perceived right to go to the organic plant in full or partial exchange for our agreement not to displace them with laid off ICI employees?

GLS/jfb

(LOGO)

June 26, 1990

Mr. Frank Hanley, General President
International Union of Operating Engineers
1125 17th Street, N. W.
Washington, D. C. 20036

Dear Sir and Brother:

Re Article IV. Section 2, Page 21 of IUOE's CONSTITUTION - Interpreting the Provisions of the Constitution and Deciding Questions of Law arising thereunder.

The following information is lengthy and rather complex, but the information is, I feel, necessary for you to consider in rendering your decisions under IUOE's

Constitution as to the questions I shall later ask.

In 1937 Victor Chemical Company built a plant in Mt. Pleasant, Tennessee to produce elemental phosphorus. The work force was small but grew as the plant prospered.

In the early 1940's, IUOE's Local 660 located in Florence, Alabama, organized the plant and negotiated a contract.

Union Carbide built a plant in Columbia, Tennessee in the early '40s, and Local 660 organized it also.

The members at Victor and Union Carbide sought their own Union, separate and apart from Local 660, thus Local Union 912 was charted July 1, 1945.

In the early 1950s, Stauffer Chemical Company bought Victor Chemical Company. In the late 1950s, the agricultural division of Stauffer built a small "organic" plant behind the elements phosphorus plant (Furnace Plant) and began a small operation making intermediates for herbicides, pesticides, and insecticides. The work force for the Organic Plant came out of the Furnace Plant's work force and was, therefore, under the same contract as was the Furnace Plant with Local 912.

The Furnace plant (elemental phosphorus) grew to a work force number of about 250. The Organic plant grew to about 125. Each Plant had its own plant manager, but a common personnel manager. That is, the personnel manager serviced both plants and did the hiring and contract administration with the respective plant manager. Later the Organic Plant did hire a personnel manager for its

plant but at that time both plants - the Furnace plant and Organic Plant - were still under the same contract with Local 912.

In the early 1960s, Local 912, IUOE, organized the Globe Washer Plant that belonged to Stauffer Chemical Company. Some 20-30 workers were involved. Their job WSA to wash the matrix (raw ore) to separate the dirt from the phosphate sand. Although the Globe Plant is being shut down, and the workers will lose their jobs, the Globe plant is not involved in the controversy that I need guidance on.

Prior to the separation of the Furnace Plant and the Organic Plant, and prior to the Furnace Plant's work force exceeding the Organic's, the membership at the plants negotiated a split committee consisting of four (4) members from each plant (Furnace and Organic) to the Negotiating Committee.

In the negotiations in September of 1982 for a new contract, Stauffer took a firm position that it was going to separate the two plants, the Furnace and Organic, and have a separate contract for each plant, since they were under two different divisions of the Company - the Chemicals Division at the Furnace plant (elemental phosphorus) and the Agricultural Division at the Organic Plant.

Since the Organic plant was staffed primarily from the Furnace plant, there was a major concern among each committee at each plant, about "bumping or rolling" between each plant in case of a reduction in force. The parties thus negotiated a "Memorandum of Agreement" and made it a part of each plant's contract, by reference, (See the included Memorandum) for those employees hired prior to September 11, 1982.

At least one employee, and possibly two others have moved under the Memorandum from the Organic plant to the Furnace plant while Stauffer still owned both plants.

In 1985 Stauffer Chemicals was purchased by Chesebourgh - Ponds. When Local 912 negotiated the Furnace and Organic plants - now separated- two strikes ensued. The Furnace plant was on strike about thirty (30) days, and the Organic plant about fifty (50) days.

The Memorandum of Agreement to bump between the two plants was continued in each contract.

In 1986 Cheseborough - Ponds sold the heretofore Stauffer plants to Unilever Corporation.

In the latter part of 1986, Unilver sold the Stauffer plants to ICI Americas Inc.

ICI's interest was primarily the Organic plant. ICI then sold the basic chemicals plants, which included the Furnace plant and the Globe Washer plant, plus a plant in Nashville to Rhone-Poulenc, Inc., in early 1987.

Local 912 then had the ICI (Organic) plant under a contract, and the Furnace plant (Elemental Phosphorus) under a separate contract. Both contracts still contained the Memorandum of Agreement to bump to the other plant.

In June 1988, Local 912 negotiated a three-year contract with ICI Americas - the old Stauffer Organic plant. ICI tried to negotiate out the Memorandum of Agreement.

The Union would not agree to let them. The company's final position was that the Company would not honor the Furnace Plant's employees bumping to the ICI (Organic) plant. The Memorandum of Agreement was left in ICI's Organic plant Contract. The Union's position was that unless and until the Memorandum was negotiated out at both affected plants - the Furnace and Organic - the Agreement was still valid and, Organic (ICI) employees could bump to the Rhone-Poulenc's Furnace Plant when applicable.

When Local 912 negotiated the Furnace plant contract in 1988 with Rhone-Poulenc, the Furnace plant Management wanted to delete the Memorandum of Agreement. Again the Local was successful in keeping the right of the Furnace plant employees to bump to ICI's Organic plant.

On Monday, June 18, 1990, Rhone-Poulenc's Manager of Employee Relations, Lee Suydam, called me and informed me the Company would be announcing the next day the shut down and cessation of operation of the Globe Washer plant and the Furnace plant to the respective plant's employees. (copies of Local Newspaper announcements enclosed.)

The dilemma that Local 912 now has is that two separate entities, each with a contract with Local 912, has a contractual right to "bump" into the other plant as a last resort. The end result thus will be that those with enough seniority at Rhone-Poulenc's Furnace plant will by the Memorandum of Agreement bump or roll those less senior at ICI's Organic plant. ICI's employees will then be laid off.

The fact that this has created much controversy is an understatement. ICI's

employees are very disgruntled and will probably try, encouraged by their Management, to negate and nullify the Memorandum of Agreement that permits Rhone-Poulenc's employees to bump them.

There is no question in my mind that either ICI's or Rhone-Poulenc's employees can, by following the proper procedure, negotiate away their Unit's right to go to the other plant. This was my position in the 1988 Negotiations at each Company. However, my position in the 1988 Negotiations was that neither Unit acting alone could negate or nullify the other Unit's right to exercise the bump or roll created by the Memorandum of Agreement negotiated in 1982, that this would have to be done jointly.

My questions to you for your interpretation of IUOE's Constitution under Article XXIV, Subdivision II, Section (e), page 105, is:

Can either ICI's employees or Rhone-Poulenc's employees, two separate entities under two separate contracts, now, acting alone, negotiate away the other entities rights under the Memorandum of Agreement dated September 13, 1982? If not, must there be a joint venture or negotiations to modify, negate or nullify the Memorandum, since the Membership affected includes both entities?

Local 912 is on the "horns of a dilemma," and a "damned if we do, damned if we don't situation."

From a logical standpoint, Rhone-Poulenc's employees, and 912's members, which is a larger Unit than ICI's, will not modify or relinquish its right to bump or roll ICI's employees, and in all probability will not even agree to a joint negotiations.

On the other hand, ICI's employees, also 912's members under a separate contract and a much smaller unit, (125 versus 280) goaded by ICI's Management, will in all probability try everything possible to frustrate, circumvent, and/or prevent Rhone-Poulenc's employees from bumping them.

I appreciate your interpretation and counsel in this matter.

Fraternally,

/s James B. Kincade
James B. Kincade
Business Manager

JBK/fr

July 27, 1990

Mr. James B. Kincade
Business Manager
IUOE Local Union No. 912
111 Nashville Highway
Columbia, TN 38401

Dear Sir and Brother:

Reference is made to your June 26, 1990 letter to me concerning a memorandum of agreement contained in two collective bargaining agreements IUOE Local Union No. 912 has at separate plants, one owned by ICI Americas Inc. and the other owned by Rhone-Poulenc, Inc. The memorandum of agreement gives employees at each plant the right to bump or roll employees at the other plant under certain circumstances. Apparently, one of the Plants is scheduled to be closed and

questions have arisen about the rights of the employees under the terms of the memorandum of agreement. You request my interpretation of Article XXIV, Subdivision 11, Section (e) of the International Constitution as to which employees should be allowed to vote on the resolution of these questions.

Article XXIV, Subdivision 11, Section (e) provides, in pertinent part, that:

> Proposed collective bargaining agreements and modifications thereof may be negotiated for Local Unions by the Business Manager, by a committee, by the Local Executive Board, or by the Business Representative. Such agreements and modifications thereof shall not be executed until they have been presented at the next membership meeting following the negotiation of the proposed agreement and ;have been approved by the membership affected...

However, the situation described in your letter does not require an interpretation of

this section of the Constitution. In your situation, the rights of the employees to bump and roll from one plant to the other are governed by the provisions of an existing memorandum of agreement. Since this memorandum of agreement is already in existence and has been in existence for some time, it is not a "proposed agreement or modification thereof" requiring additional membership approval now. Thus, there is no need to determine at this time what set of members constitute the "membership affected" that would be entitled to vote on a "proposed agreement or modification thereof."

Fraternally yours,

Frank Hanley
General President

FH:dp

cc: Regional Director

(LOGO)

ICI SPECIALTIES

P.O. Box 152

Mt. Pleasant

Tennessee 38474

Telephone (615) 379-3257

Fax (615) 379-7124

August 27, 1991

Mr. Thomas Alexander

Local Union 912

International Union of

Operating Engineers

111 New Nashville Highway

Columbia, TN 38401

Dear Mr. Alexander:

The enclosed document was recently left at our plant. We are sending the document to you. We

understand that the people whose signatures appear on the document are current or former Rhone-Poulenc employees represented by the International Union of operating Engineers. They are not employees of ICI. Further, we understand that the document relates to a collective bargaining agreement that the International Union of Operating Engineers has with Rhone-Poulenc. ICI is not a party to that collective bargaining agreement.

Sincerely,

ICI AMERICAS, INC.

/s Stanley M. Straker
Stanley M. Straker
Site Manager

Enclosure

SMS/tlr

(LOGO)

ICI SPECIALTIES

P.O. Box 152

Mt. Pleasant

Tennessee 38474

Telephone (615) 379-3257

Fax (615) 379-7124

September 12, 1991

W. B. Hendry

Rhone-Poulenc

P O Box 472

Mt. Pleasant, Tn 38474

Dear Mr. Hendry:

I hereby return to you the documents entitled "Notice of Intent" signed by numerous

employees which you sent to Bob Stringer by letters dated August 27, September 4 and September 6, 1991. The documents you sent have no application to ICI Americas Inc. No current or former employee of Rhone-Poulenc has "rights to move to" ICI Specialties, Mt. Pleasant plant.

Any persons interested in employment with ICI, including current or former employees of Rhone-Poulenc, are free to fill out employment applications with our company. Applications for persons who are or were employed with Rhone-Poulenc will be considered on the same basis as applications submitted by any other person.

Sincerely,

/s Stanley M. Straker
Stanley M. Straker
Plant Manager

cc: C. Boyd
B. Francis

(LOGO)

October 15, 1990

Mr. Lee Suydam
Regional Manager for Employee Relations
Rhone-Poulenc Basic Chemical Co.
Post Office Box 1381
Houston, Texas 77251

Re: Operating Engineers - ICI Americas
and Rhone-Poulenc

Dear Mr. Suydam:

I enjoyed talking with you on Monday, and as we discussed, enclosed please find a copy of the Complaint which I am going to file in the District Court in Nashville concerning the September 1982 memorandum of agreement. As we discussed, ICI has stated

its intention not to honor the agreement, although it is a part of the Operating Engineers contract with them. As we also discussed, I consider this a friendly lawsuit as we are only asking the court to declare the rights of the parties, and not for damages or anything else. If, after reviewing the Complaint, you have any thoughts or suggestions, please do not hesitate to contact me.

With best regards, I am

Sincerely yours,

/s C. Dewey Branstetter, Jr.
C. DEWEY BRANSTETTER, JR.

CDBjr:kac
suydam.ltr

Supreme Court, U.S.
FILED

95-841 NOV 29 1995

OFFICE OF THE CLERK

NO. _____

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1995

ALBERT AKINS, ET AL.,
PETITIONERS

v.

ZENECA, INC.,; RHONE-POULENC, INC.; RHONE-POULENC BASIC CHEMICALS COMPANY; STAUFFER CHEMICAL COMPANY; INTERNATIONAL UNION OF OPERATING ENGINEERS, AFL-CIO; LOCAL 912 INTERNATIONAL UNION OF OPERATING ENGINEERS, AFL-CIO,
RESPONDENTS

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

VOLUME II

PETITION FOR WRIT OF CERTIORARI

Frank Steiner
Counsel of Record
STEINER & STEINER
214 Second Avenue North
Suite 203
Nashville, TN 37201
(615) 244-5063

(LOGO)

October 16, 1990

Mr. Mark Dobbins
ICI Americas, Inc.
Employee Relations Department
Rollins Building, Third Floor
Wilmington, Deiaware 19897

Dear Mr. Dobbins:

Re: Qperating Engineers Local 912
v. Rhone-Poulenc and ICI

In accordance with my telephone conversation on Tuesday with Janell Taylor in your office, enclosed please find a copy of the complaint which I am filing on behalf of Local 912 of the Operating Engineers. As I explained to Ms. Taylor, I consider this to be

a "friendly" lawsuit in which I am asking the federal court to determine the validity of the September, 1982, memorandum of agreement. As you are aware, Rhone-Poulenc is closing its facility in Mt. Pleasant, and the Rhone-Poulenc employees who are eligible have requested that they be allowed to transfer to ICI and bump less senior employees. It is my understanding that ICI has taken the position that they will not allow this to happen, and I believe the only alternative for us is to ask the court to determine whether that contractual provision is valid. Unquestionably, the Operating Engineers are in an uncomfortable position over this, as they represent the employees at both facilities.

If you would care to discuss this matter further, please don't hesitate to contact me. Also, if you have any thoughts or questions

concerning the complaint, I would be more than willing to discuss it with you.

With best regards, I am

Sincerely yours,

/s C. Dewey Branstetter, Jr.
C. DEWEY BRANSTETTER, JR.

CDBjr:kac
dobbins.ltr

(LOGO)

December 12, 1990

VIA TELEFAX

C. Dewey Branstetter
Branstetter, Kilgore, Stranch
& Jennings
200 Church Street
Fourth Floor
Nashville, Tennessee 37201

RE: Local Union 912 v. Rhone-Poulenc Basic Chemical Company and ICI Americas Inc. - Case No. 1-90-0160

Dear Mr. Branstetter:

This letter will outline some of the thoughts presented by Julie Manning and myself on behalf of ICI Americas Inc., ("ICI") at our December 5, 1990 meeting.

As we indicated, ICI is ready to defend this lawsuit and we feel comfortable that the suit would be dismissed if we ask the Court to do so. Before ICI invests time and money in pursuing depositions and its Motion to Dismiss, however, the Company was interested in exploring whether there might be a way of resolving the case in a fashion beneficial to all. We suspect that business changes about to occur regarding the Mt. Pleasant Organic Plant present an opportunity for a resolution by which everyone wins, and that was the focus of our discussions at the December 5 meeting. We wish to reiterate that our discussions on December 5 and this letter constitute settlement discussions which are inadmissible in any legal proceeding in any forum.

To summarize ICI's proposal, we suggested that contract negotiations between ICI and Local 912 be opened now, with ICI's workers

thereby receiving an increased economic package earlier than they otherwise might receive such benefits. Coupled with this could be an agreement on a preferential hiring arrangement whereby laid off Rhone-Poulenc workers meeting agreed qualifications would be given first chance to fill new ICI jobs as the Mt. Pleasant Plant grows in the future. Of course, part of negotiations would be deletion of any reference to the September 13, 1982 Memorandum of Agreement as well as the other obsolete side agreements.

Let me reiterate the reasons why we expect that Judge Higgins, if asked, would dismiss the lawsuit [and refuse to give Local 912 any opinion as to whether the September 13, 1982 Memorandum of Agreement is enforceable]. First, as I am sure the Union knows, the collective bargaining agreement expressly requires the Union to follow the

grievance procedure and complete the arbitration process as to all disputes relating to interpretation of the contract...No grievance can be filed at this point because there is nothing to grieve. No layoffs have occurred and, as Rhone-Poulenc has now stated in its Answer, it has not even decided on any time frame for any layoffs to begin.

Second, the lawsuit would be dismissed for the additional reason that the law regarding declaratory judgments requires that there exist an actual "controversy" between the parties, and none exists here. The Union's suit does not claim that the September 13, 1982 document is enforceable against ICI, nor does it not ask the Court to rule that, if Rhone-Poulenc's plant closes, its employees have the right to put ICI's workers on the street. Rather, the suit improperly asks the

Court to give the Union advice as to whether the 1982 document is valid. Thus, the only controversy revealed by the complaint is one between the Rhone-Poulenc employees and the ICI employees, both of which groups the Union is supposed to represent. Unless and until the Union files in court a document claiming that the ICI employees (who the Union represents) should lose their jobs to laid off Rhone-Poulenc workers, there is no controversy between ICI and Local 912, and the case must be dismissed. We believe there is a serious question as to whether the officers of Local 912 are really ready to state in writing that ICI's workers should be put on the street in order to make way for laid off employees with lesser skills who are employed by another company.

Third, the law clearly provides that Judge Higgins has no jurisdiction over this

Section 301 lawsuit, because the Union has improperly asked the Court to decide the validity of the 1982 document. Section 301, under which the suit was filed, only permits courts to decide whether a collective bargaining agreement has been violated by a party. Until the Union files a public document with the Court claiming that a refusal to throw ICI workers out of their jobs will violate the contract, the Court has no authority to hear the lawsuit. Of course, Local 912's representatives also would need to testify that they believe the ICI employees should be forced to give up their jobs to employees from Rhone-Poulenc if Rhone-Poulenc's plant closes.

Fourth, we think that the several depositions we intend to take will establish that the Union is unable to prove any likelihood that a sufficient number of Rhone-

Poulenc workers will be laid off before the collective bargaining agreement expires next June, to cause the September 13, 1982 Memorandum of Agreement to come into play. In this regard, please note that paragraph 11 of Rhone-Poulenc's Answer "denies that it has announced a specific date on which it plans to begin laying off employees from the Furnace Plant." Because the Union will be unable to show that the enforceability of the 1982 document will come into question prior to June, the case is not a proper declaratory judgment action and must be dismissed.

Of course, because the September 13, 1982 document will not be in effect if and when Rhone-Poulenc lays off a sufficient number of people, pursuit of this lawsuit will result in Rhone-Poulenc workers getting nothing whenever they are laid off.

This brings me to the reason why we believe certain business changes at ICI offer an opportunity for the parties to reach an agreement now that will place ICI's workers, Rhone-Poulenc's workers, and Local 912's officials in a <u>better</u> position than they will be in if this lawsuit continues. We do not think it is in anyone's interest to let this opportunity pass and have everyone end up with nothing but expensive bills from their lawyers.

The opportunity for us to reach a mutually beneficial agreement arises from the fact that the ICI Specialties business group will be taking over the Mt. Pleasant Organic Plant as of January 1. The advent of Specialties business group control will mean eventual implementation of the Total Quality Commitment ("TQC") program that Julia Manning outlined at our December 5 meeting. Some of

the highlights of the TQC program are Process Improvement Teams, Steering Committees comprised of labor and management representatives, substantial operational input from the workforce, and expected significant decreases in incidents of employee discipline and grievances.

Successful implementation of TQC requires a significant management-labor culture change, and it is in ICI's interest to begin that process early by entering into early negotiations with the Union. Early opening of negotiations will also allow ICI employees to immediately obtain enhanced economic benefits that they would not otherwise be in a position to receive until after the current contract expires next June.

While negotiations obviously must result in elimination of any reference to the

September 13, 1982 Memorandum of Agreement, as well as the other obsolete and unenforceable side agreements, ICI is prepared at the same time to negotiate a preferential hiring arrangement whereby laid off Rhone-Poulenc workers, meeting agreed qualifications, would be hired at the Organic Plant as the Specialties group creates new employment opportunities in the future.

To summarize, we believe that if Local 912 continues its lawsuit, the result will be as follows:

1. The lawsuit will be dismissed;

2. Local 912 will have substantial legal expenses;

3. Rhone-Poulenc employees, if and when they are laid off, will have nothing;

4. ICI employees will be angry with Local 912 representatives for pursuing an action designed to force them out of their jobs; and

5. Rhone-Poulenc employees will be angry with Local 912 representatives for giving up the chance to obtain preferential hiring rights with ICI.

On the other hand, the results of an arrangement in the form outlined above will be:

1. Rhone-Poulenc employees will obtain valuable preferential hiring rights with ICI, whose Mt. Pleasant facility is expected to grow;
2. ICI employees will end up with enhanced economic benefits several months earlier than they otherwise might receive such benefits;
3. Rhone-Poulenc employees will recognize that Local 912 has placed them in a better position than they were in with the lawsuit pending;
4. ICI employees will be grateful to Local 912's representatives for getting them better economic benefits and early implementation of the Total Quality Commitment program; and
5. The Union saves substantial legal expenses.

In light of these factors, we recommend that your client seriously consider ICI's proposal. My instructions are to seek an early response and, absent meaningful progress toward agreement, to aggressively pursue dismissal of the lawsuit.

Finally, we want to stress that nothing in this letter, prepared strictly for settlement purposes, should be construed as a concession by ICI that the September 13, 1982 Memorandum of Agreement is enforceable. It remains ICI's position that the document is unenforceable, and we believe the Court would reach the same conclusion.

Very truly yours,

s/Cary Schwimmer
CARY SCHWIMMER
For YOUNG & PERL, P.C.

CS:krp
cc: Julia Manning, Esq.

FAX TRANSMISSION

TODAY'S DATE: 7/10/91 TIME: 1:35

NO. OF PAGES 10

TO: General President

LOCATION: Washington, D.C.

FAX NUMBER: 202-429-0316

TELEPHONE NUMBER:

COMMENTS: Please respond no later than 7/12/91

FROM: Waylon Carroll/Terrance Nevette

LOCATION: Mt. Pleasant, TN

FAX NUMBER: 615-379-1456

July 10, 1991

General President
International Union of Operating Engineers
1125 Seventeenth Street Northwest
Washington, DC 20036

Dear General President:

We, the members of IUOE Local 912 are concerned about whether our interests were represented by our Union Representative, James Kincaid. We feel that we have been misled as well as misrepresented. In the 1982 agreement, a clause was added concerning roll-back rights between the two plants. At the time, both plants were Stauffer Chemical Company. Since, the plants have been sold several times and are now owned by ICI (Organic) and Rhone-Poulenc Chemical Company (Furnace).

We feel that Local 912 has a conflict of interest by representing both plants. We were told by Mr. Kincaid, at the May 1991 meeting that we had an uphill battle, because ICI wanted the roll-back clause taken out of their contract. We were also told by Mr. Kincaid and Mr. Dewey Bransetter, from the Union's Law Firm, that removal of the clause would not

affect us. On June 11, 1991, contract deadline at ICI, the roll-back clause was the key issue. After which, the attorney for Local 912 withdrew the request for a court ruling which had been scheduled for October 15, 1991, on said agreement.

In June we had a meeting with our Union Steward. We discussed the opening of the RP Basic contract. He was asked not to open before deadline by several members. Charles Morton, Chief Job Steward, asked that the contract be opened, at which time, Mr. Kincaid said there was a 60-day deadline. We feel that the best interest of those concerned, was not taken into consideration. In further discussion, Mr. Kincaid read a letter from the Union Law Firm, informing members that the case would be dropped. Mr. Kincaid further stated that individual members should seek legal representation. He was then asked for a

copy of the letter from the law firm, but he refused.

On June 28, 1991, the RP Plant will cease operation. The plant was originally scheduled to cease operation in February; but the plans were changed. On July 5, 1991, approximately 130 people were laid off. Several of these are eligible to roll-back to ICI, according to the 1982 contract. On July 8, these seven will attempt to exercise their rights to roll-back at the personnel office of ICI. We believe there are 50 or 60 more members who are eligible to roll-back rights, who will not be laid off until the second lay-off, scheduled for sometime around the first of 1992.

We would appreciate anything you could do for us, as our union seems to be working against our best interest. There are many

people who have worked at the plant 10-35 years, who will be left with nothing. We have enclosed our Second Stage Grievance against both ICI and Rhone-Poulenc.

Sincerely,

Terry Nevette/Waylon Carroll

INTERNATIONAL UNION OF OPERATING ENGINEERS
LOCAL UNION NO. 912
(LOGO)

July 16, 1991

Mr. Frank Hanley, General President
International Union of Operating
Engineers, AFL-CIO
1125 17th Street, N.W.
Washington, D.C. 20036

Dear Sir and Brother

Re Your letter addressed to me dated 11 July, 1991 and a copy of correspondence from Local 912 Members Terry Nevette and Waylon Carroll, regarding representation in their Local (Local 912) Union

In your letter addressed to me, dated July 11, 1991, you requested I submit a report to your

office concerning the subject matter referenced above by Local 912 members Terry Nevette and Waylon Carroll in a letter to you by Fax Transmission dated 10 July 1991, wherein the two members stated:

> "...We the members of IUOE Local 912 are concerned about whether our interests were represented by our Union Representative, James Kincaid, (sic). We feel that we have been misled as well as misrepresented."

In substance the disgruntled members have three complaints: One, the roll or bumping issue and the alleged conflict of interest by Local 912, IUOE, representing both plants in the controversy; two, the Union's refusal to give a copy of its attorney's letter withdrawing its "Declaratory Judgment Suit" to one or more of the disgruntled members; and,

three, the opening of Rhone-Poulenc's (the old Stauffer Furnace Plant) contract with Local Union 912, which expires 15 August 1991.

As to the first complaint, on June 26, 1990, I, James B. Kincade, wrote you a letter (copy enclosed, numbered Document #1) explaining the dilemma that Local 912 faced requesting your interpretation and counsel in the matter. On 27 July 1990 you responded by letter, a copy of which is attached to my June 26 letter. In addition, I have talked with Richard Griffin and Helen Morgan in IUOE's legal department as to the general problem involved.

After talking with Dewey Branstetter, Jr. of the Nashville Law Firm of Branstetter, Kilgore, Stranch and Jennings, it was decided that the proper route to go was with a Declaratory Judgement lawsuit, a copy of which is attached and numbered as document #2. This

suit was filed on October 16, 1990. It is self-explanatory.

The cessation of Rhone-Poulenc's operation was delayed by its top management from January 1, 1991 to July 5, 1991.

ICI's contract by its term expired 11 June 1991. And as was feared by Local 912, ICI took a firm position that the Memorandum of Agreement dated 13 September 1982 (bumping between the two plants) be deleted from its contract. Local 912's negotiating committee, which was empowered to accept or reject, was personally opposed to deleting the Memorandum. However, the committee recognized that deleting the controverted memorandum was not a strike issue with ICI's employees and Local 912's members, therefore, the Memorandum was negotiated out and was deleted from ICI's contract. I did not feel that this would

nullify the 1982 memorandum Agreement (Bumping) however, because of the third-party rights involved - the rights of Rhone-Poulenc's employees and also 912's members.

Attorney Dewey Branstetter contended that taking the memorandum out of ICI's contract before the fact of the plant lay-off at Rhone-Poulenc now rendered the controversy moot. (See Branstetter's letter to me dated 14 June 1991, numbered document #3.) Branstetter recommended Local 912 dismiss its suit, which I did. This was not done hastily. I questioned him extensively as to what 912 could do if the suit was withdrawn. The other remedies he mentioned are set-forth in his letter. He was not optimistic about prevailing with a NLRB charge. Nor was he optimistic about prevailing in the grievance route. He seemed to feel that the best route

was an individual law suit arguing vested interest, but the chances here were slim.

At Local 912's July regular membership meeting with Rhone-Poulenc's employees there was much controversy, disagreement, and disgruntlement about the issue. Someone had called a reporter from the Local newspaper that came to the meeting. He was requested to leave, which he did. I read the letter from Attorney Branstetter to the assembly. Several wanted a copy of the letter; which request I denied, citing IUOE's Constitution that what we did was to remain inviolate and private from persons outside the Organization. I cited the fact that a reporter had been notified by someone. I, also, learned later that one of Nashville's television reporters had been invited. The reporter could not find the meeting hall until after the meeting was over.

As to the second complaint, I did agree to let any interested member come to the Union Hall's office and review the attorney's letter, but not copy it. I further agreed to cooperate with any individual's attorney, if such individual wanted to pursue an individual lawsuit.

Although I recommended the members not go the grievance route in the controversy, because of the obstacles apparent, I drafted the written grievance for them, requesting they wait until the lay-off occurred before grieving. (The grievance was attached to Nevette's and Carroll's letter faxed to you dated 10 July 1991.)

The problems with the grievance route are many and gets back into the legal arena. One question is obvious. Suppose Rhone-Poulenc grants the grievance! How can Local 912 make

ICI take the employees from Rhone-Poulenc. If Local 912 goes to court in an effort to do so, where does that leave Local 912 with its members at ICI as to fair and proper representation? This is one of the dilemmas I discussed with Branstetter, our attorney. This is one of the reasons he recommended against the grievance route.

Local Union 912 has certainly not been arbitrary, discriminatory, and/or capricious in this matter. Lack of satisfaction certainly does not mean lack of representation. I have sought guidance from your office and IUOE's legal department as well as Local 912's Attorneys. Any route 912 goes there is disagreement. It's just a question of whose ox is getting gored.

As to the third problem - the opening or not opening of the contract, Local 912's contract,

by its term expires 15 August 1991. Local 912 has never had or called a meeting as to whether to re-open the contract. I and some others recognized our reduced bargaining power with the scheduled shut down of the plant. However, since the cessation of operation and lay-off was to be in phases - the second phase in January of 1992, of some eighty (80) more, and a remainder of some 30 to 40 for 4 to 8 years, I told the members in our May' 91 meeting, after discussing the pros and cons of the opening or not opening the contract, that I intended to open it. I had three or four calls opposed to the opening of the contract, but that was the extent of the manifested opposition.

The allegation that "... our Union seems to be working against our best interest..." is not factual. Local 912 is doing everything that it knows to do with the dilemma it is

confronted with. As stated earlier, I have sought counsel from your office; used my twenty-three years of knowledge and experience, and have sought and obtained legal counsel in an effort to resolve this issue of bumping and/or rolling between the now two separate entities. Some two hundred plus are going to ultimately lose their jobs. The want to displace more junior employees at ICI as per the 1982 Memorandum of Agreement negotiated when the two entities were one company - Stauffer.

The question, and issue, is: Can the Rhone-Poulenc employees (Old Stauffer Furnace Plant), and now Local 912 members, bump under the 1982 Memorandum of which the Organic was a party to, (now ICI Americas) after all that has transpired and change - the deleting the Memorandum from ICI's contract by 912 members?

Our attorney, Branstetter says the chances are slim and none. He did not think Local 912 could prevail under any of the three routes he mentioned: the grievance route, the Board charges, and the individual law suit. My Assistant, Thomas Alexander, talked with a local attorney here in Columbia and he, in general, concurred with Branstetter.

Local 912's position has not changed. Local 912 knows what the intent and objective of the 1982 Memorandum was. It is the changing of time and events that has caused the problem of gaining the objective of bumping under the 1982 memorandum. (Copy enclosed, designated document #4.)

Legal questions are now involved of which there is not sufficient case law to guide us, according to our attorneys, in an effort to force ICI to take the Rhone-Poulenc employees

after ICI negotiated the Memorandum out of its contract. Our members who are disgruntled who work at Rhone-Poulenc think that Local 912 can just wave a magic wand and effect the bump, regardless of all that has transpired.

As stated in my letter to you of June 26, 1990 the Union is in a no-win situation. we are "damned if we do, damned if we don't."

Local 912 intends to do the best it can with the situation. If you have any suggestions as to how to equitably resolve the dilemma, please advise.

Brothers Nevette and Carroll included a copy of the Severance Agreement negotiated between the Parties prior to the first lay-off, and a copy of the 1982 memorandum, which I have enclosed.

It is note-worthy that neither Nevette or Carroll were effected in the first lay-off (see documents 5 and 6). Nevette told me over the telephone that he would not attempt to bump to the ICI plant were there no controversy.

I have enclosed three other documents which are self-explanatory - documents 5, 6, 7 and 8.

I trust the foregoing is sufficient for you to understand the controversy and dilemma. If not, please advise.

Fraternally,

/s James B. Kincade
James B. Kincade
Business Manager

JBK/fr

Received Aug - 7 1991

(INTERNATIONAL UNION OF OPERATING ENGINEERS)
(LOGO)

Office of General President . (202) 429-9100

EXHIBIT
NO. 27
Karl Hall 5-27-92
Court Reporter

August 5, 1991

Mr. Terrance Nevette

No. 1 Redwood Subdivision

Columbia, TN 38401

Dear Sir and Brother:

Reference is made to the unsigned facsimile letter of yourself and Brother Waylon Carroll forwarded to this office on July 12, 1991 concerning your roll back rights under applicable bargaining agreements entered into between your employer and IUOE Local Union No. 912.

After reviewing this matter, I have determined that the referenced agreements were entered into by the Local Union as exclusive bargaining representative for the respective bargaining units, and that the International Union is not a party to those agreements. Accordingly, the International Union is without authority to alter or amend the terms of those agreements nor intervene in the subject matter of your letter. Be further advised, however, that it appears that Local Union No. 912 has acted vigorously and in good faith in this matter to protect the interests of all members covered by the applicable collective bargaining agreements.

Fraternally yours,

Frank Hanley
General President

FH:glt

cc: Business Manager, Local 912
Regional Director
Waylon Carroll

INTERNATIONAL UNION OF OPERATING ENGINEERS
LOCAL UNION NO. 912

(LOGO)

September 27, 1991

Mr. Paul Pruett, Plant Manager

Rhone-Poulenc

P.O. Box 472

Mt. Pleasant, Tennessee 38474

Dear Mr. Pruett:

Re: GRIEVANCE NO. F91-13

The Union will withdraw the above-referenced Grievance.

Yours truly,

Thomas Lee Alexander

TLA/fr

INTERNATIONAL UNION OF OPERATING ENGINEERS
LOCAL UNION NO. 912

(LOGO)

September 30, 1991

Mr. Waylon Carroll

Route #1, Box 264

Summertown, Tennessee 38483

Dear Sir and Brother:

Re Bumping Controversy Grievance
Designated F91-13, Dated 8-22-91

This letter is in response to your question as to the status of the subject-grievance.

Based on our previous discussions, the obstacles to overcome, the legal questions involved, and the legal opinion of our Attorney, C. Dewey Branstetter, Jr., (a copy of whose letter is enclosed, dated 9-9-91) and

the Memorandum of Agreement dated 13 October 1988 (a copy of which is enclosed), the Union is discontinuing the grievance.

If you have any further questions, please call or come by the office.

Fraternally,

/s James B. Kincade
James B. Kincade
Business Manager

JBK/fr

...

Q And what did Mr. Kincade continue to tell you?

A He kept telling us that they could not affect us. If they voted it out of their contract, they could not vote ours away.

...

Q Mr. Carroll, if you had known ultimately, looking back, if you had known that the ICI employees deleting that from the contract, deleting the cross bumping portion from your contract would have affected your rights what would you have done?

A The first thing that we would have done was wanted a committee, our committee in on those meetings, and to represent our behalf. And if they had ever tried to vote it out, they couldn't because we had 250 members. They had a hundred twenty-

five. It just wouldn't have come out there.

Q The ICI contract of 1991, was that ever submitted to you or the employees at Rhone-Poulenc for approval?

A No, ma'am.

Q Do you think it should have been?

A Yes, ma'am.

...

Q The fact that the ICI and Local 912 bumped or deleted the cross bumping agreement from their '91 contract, do you feel that affected your rights?

A Yes, I do.

...

IN THE UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF TENNESSEE
COLUMBIA DIVISION

ALBERT AKINS, ET AL., Plaintiffs,	)	
v.	)	CIVIL NO. 1-91-0134
	)	(JUDGE HIGGINS)
ICI AMERICAS INC., ET AL., Defendants.	)	(JURY DEMAND)

AFFIDAVIT OF TERRANCE NEVETTE

I, Terrance Nevette, first being duly sworn, state as follows:

1. I am a Plaintiff in this action. After the execution of the 1982 cross-bumping agreement, the Union officials, including Mr. Kincade, regularly informed members of both bargaining units that one bargaining unit could not affect the rights of the other bargaining unit under the cross-bumping agreement. When we became concerned in 1991 that ICI and the bargaining unit for the organic plant would attempt to destroy our rights, the Union officials continued to

inform us that we did not need to be concerned because the other bargaining unit could not affect our rights.

2. The Union meeting for the bargaining unit for the furnace plant was scheduled for the second Monday of each month. The Union canceled our meeting which was scheduled for June 11, 1991. The meeting was rescheduled and held on June 18, 1991. At that time, the Union officials, through Mr. Kincade, informed us for the first time that in their opinion, our one time transfer rights had been terminated by the June 11, 1991, contract agreed to by ICI and the bargaining unit for the organic plant. Mr. Kincade also informed us at that meeting that the declaratory judgment action had been dismissed. This was the first knowledge that the members of the bargaining unit for the furnace plant had that the declaratory judgment action was even being considered for

dismissal. Mr. Kincade also read Mr. Branstetter's letter of June 14, 1991, to the members (Exhibit 15 to Kincade deposition). However, he refused to give us a copy of that letter.

3. After the Union meeting of June 18, 1991, I called Mr. Branstetter concerning his letter and the declaratory judgment action. Mr. Branstetter refused to furnish me any information. He told me that he represented Mr. Kincade and that there was a conflict of interest between Mr. Kincade and me. I asked him whether there was a conflict of interest between the bargaining units for the organic plant and the furnace plant but he refused to discuss it with me.

4. I have also read on this date the letter dated December 12, 1990, from ICI to Mr. Branstetter. Neither I nor to my knowledge any member of the bargaining unit for the furnace plant was ever notified of the

information in that letter concerning the possibility of settlement on a priority hiring basis. We had no knowledge of this letter until it was produced in this action.

FURTHER AFFIANT SAITH NOT.

/s Terrance Nevette
TERRANCE NEVETTE

STATE OF TENNESSEE)
COUNTY OF DAVIDSON)

Sworn to and subscribed before me on this 7th day of October, 1992.

/s Carrie A. Plowman
NOTARY PUBLIC

MY COMMISSION EXPIRES:

May 22, 1993

91053AF2

IN THE UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF TENNESSEE
COLUMBIA DIVISION

ALBERT AKINS, ET AL., Plaintiffs,	)	
v.	)	CIVIL NO. 1-91-0134
ICI AMERICAS INC., ET AL.,	)	(JUDGE HIGGINS) (JURY DEMAND)
Defendants.	)	

AFFIDAVIT OF DAVID PALEY

My name is David Paley. I am one of the Plaintiffs in this action and I was employed at the phosphate plant from February 3, 1975, until laid off on September 27, 1991.

I was a member of the negotiating committee with Rhone-Poulenc Inc. for the October, 1988, Collective Bargaining Agreement applicable to the phosphate plant. Throughout these negotiations, we made clear to Rhone-Poulenc Inc. that we would not agree to any changes in the Memorandum Agreement of September 13, 1982.

Proposal A, submitted by Rhone Poulenc Inc. (Plaintiffs' Exhibit 2), would have amended the September 13, 1982, agreement to prohibit ICI Americas Inc. employees from the organic plant displacing or exercising seniority over employees of Rhone-Poulenc Inc., including the Plaintiffs. We rejected that proposal.

Proposal B (Plaintiffs' Exhibit 3), submitted by Rhone-Poulenc Inc. would have amended the September 13, 1982, agreement to provide that employees of the phosphate plant who sought to exercise their seniority at ICI Americas Inc.'s organic plant, relied solely on the commitment of ICI Americas Inc. to the September 13, 1982, Memorandum Agreement. Proposal B further provided that Rhone-Poulenc Inc. would not be responsible to its former employees in such efforts nor would there be any other remedy against Rhone-Poulenc Inc. We rejected Proposal B.

We insisted that the September 13, 1982, Memorandum Agreement not be changed. In acceptance of this condition, Rhone-Poulenc Inc. then submitted the memorandum dated October 13, 1988. It was the understanding of the parties and the meaning of the agreement that employees who were not covered under the September 13, 1982, agreement, would be laid off under Article VIII of the Collective Bargaining Agreement and that the employees covered by the September 13, 1982, Memorandum Agreement would be laid off under the terms of the September 13, 1982, agreement. Under the September 13, 1982, agreement, employees acquired transfer rights only after they exhausted their rights under Article VIII of the Collective Bargaining Agreement.

In the final 1988 Collective Bargaining Agreement, the Memorandum Agreement of September 13, 1982, was expressly incorporated without change. (Article XVII,

Section XI, p. 47 - Exhibit 2, Pruett Affidavit.) In the subsequent Rhone-Poulenc Inc. Collective Bargaining Agreement for 1991, the Memorandum Agreement of September 13, 1982, was again expressly incorporated without change and is presently in effect.

The Memorandum Agreement of April 19, 1991, including the waiver of obligations and liabilities form (Exhibit 3, Pruett Affidavit), related to separation pay. Neither the agreement nor the waiver designated the Memorandum Agreement of September 13, 1982, as being released nor did they make any specific reference to claims under the Age Discrimination in Employment Act. No amount was included in severance pay for the release of transfer rights under the Memorandum Agreement of September 13, 1982.

Numerous employees were laid off who were not covered by the Memorandum Agreement of September 13, 1982. The

severance pay for these employees was computed in the same manner as Plaintiffs' severance pay. Certain of the employees receiving severance pay, who had no transfer rights under the Memorandum Agreement of September 13, 1982, had equal or greater seniority to some of the Plaintiffs. All of the terminated employees received severance pay computed in the same manner.

I accepted separation pay. At the time of my acceptance, the Defendants, ICI Americas Inc. and Rhone-Poulenc Inc., were refusing to honor Plaintiffs' contractual transfer rights.

At Plaintiffs' insistence, the Union pursued a grievance to Rhone-Poulenc Inc. concerning the transfer rights through the second step of the grievance procedure. Rhone-Poulenc Inc. denied the second step grievance. Plaintiffs insisted the Union pursue the grievance further but the Union

unilaterally withdrew and discontinued the grievance.

Under the grievance procedures of the Collective Bargaining Agreement, the Union had the sole right to pursue the grievance after the employee complaint. There is no provision in the contract authorizing individual employees on their own to pursue their grievances to the third step and higher. There was no internal Union remedy remaining to Plaintiffs to contest the Union's actions.

Rhone-Poulenc Inc. announced in June of 1990 that it would begin layoffs in February of 1991. On December 6, 1990, the Defendant, Rhone-Poulenc Inc., in its answer to the Union's suit, indicated for the first time that layoffs may not begin as planned.

/s David Paley
DAVID PALEY

STATE OF TENNESSEE)

COUNTY OF LEWIS)

Sworn to and subscribed before me this 7 day of Mar. 1992.

/s W. L. Gilbreath
NOTARY PUBLIC

MY COMMISSION EXPIRES:

11-4-94

91053AF

...

DAVID E. PALEY,

after having been first duly sworn, testified as follows:

...

Q Did you work in the furnace plant during the entire time of your tenure at Stauffer or later at Rhone-Poulenc?

A No, sir. I worked for the furnace plant for about six months and went to the organic plant. I worked there, I guess five or six years, and transferred back up to the furnace plant where I was laid off from.

...

Q Did you have any discussion with Mr. Kincaid after you got the June 20, 1990, letter as to whether the union thought you would be able to force ICI to accept furnace plant employees?

A He told us that the Memorandum of Agreement was in effect and it was -- they

would have to abide by it. No matter what they said, it was in writing and it was a contract that we had and that they would have to honor it.

...

Q ...mentioned your complaint here alleges that there was a conspiracy. You understand that?

A Yes, sir.

Q Do you believe there was a conspiracy?

A Yes, sir.

Q What is your basis for believing that any representative of any defendant got together with a representative of another defendant in order to plan to do anything?

A It just doesn't look like the way everything fell into place would have just fell into place the way it did.

Q Well, tell me what fell into place that you believe would not fall into place absent a plan or scheme to deprive you of your rights?

A There was a judgment -- declaratory judgment filed with the Court. The union stated that it didn't matter what ICI would do in their contract, it would not affect us. Rhone-Poulenc postponed our layoffs until after ICI's contract, when they took this Memorandum of Agreement out of the contract, and then the declaratory judgment suit was dropped the next day after ICI's Memorandum of Agreement was taken out of the contract.

...

Q I want to understand what you mean by postpone. Are you saying that the reason that the layoffs began at a later date than they initially were announced for was because Rhone-Poulenc wanted to allow ICI to get the Memorandum of Agreement out of its contract before layoffs began?

A Yes, sir.

...

Q What is he lying about?

A The union had received a document stating that Rhone-Poulenc had admitted their liability, and it is prior to the dropping of the lawsuit.

Q The union received a document in which Rhone-Poulenc admitted its liability prior to the dropping of the lawsuit?

A That's what Lee Suydam says.

Q Lee Suydam said that the union received a document where Rhone-Poulenc admitted its liability before the lawsuit was dropped?

A Yes, sir.

Q What document was he talking about?

A It was an interoffice correspondence prior to the 1988 Agreement.

...

Q You are talking about Mr. Kincaid lying and something about a document. I want to know how that translates into the union, meaning Local 912, getting together with any

other defendant in order to plan to do anything.

A I don't know, but the lawsuit was dropped the day after the organic contract was signed.

Q But you have been told that the union's attorney advised that that's what should be done?

A That's what I was told, yes.

Q You believe that the local's decision to follow its attorney's advice is evidence of a conspiracy. Is that correct?

A That's part of it, yes, sir.

Q What else is there that you believe is evidence of a conspiracy?

A The timing of it.

Q The timing of the dropping of the lawsuit the day after --

A After the contract was signed, the layoffs were postponed until the contract was signed.

...

Q Have you offered to give the severance pay back to Rhone-Poulenc?

A If I go to work, I will give it back to them.

Q Have you told them?

A No, sir. I haven't got a job yet.

Q To this moment, have you told anyone if you got a job at ICI, you would give the severance pay back to Rhone-Poulenc?

A I'm sure I have.

Q Do you know who you told?

A I think I told Waylon.

Q Anyone else?

A My wife.

Q Anyone else?

A I'm sure I have.

Q Have any of the plaintiffs in this case, to your knowledge, offered to give their severance pay back to Rhone-Poulenc if they got a job at ICI?

A The ones I have directly asked them.

Q Who?

A Waylon is one.

Q Waylon who?

...

Q Did anybody talk about the September 13, 1982, document you are relying on?

...

Q What was stated?

A That it was legal and binding and the lawsuit should have never been dropped to get to the declaratory judgment, I think is what you call it.

Q Did anybody say why this is legal and binding?

A It's in black and white. It was agreed to with all the parties. Why would it not be binding?

...

Q And what else did you see or hear or have you heard about how this document came about?

A That's just at the union meetings when they was explaining the contract, and as the committee members come through the plant and explained how the new contract was, that's what they told us. Kincaid, that's the way he explained it to us. If you was ever going to be laid off from one of the plants, you could go to the other plant.

...

Q At any time that you have been told about how it came about.

A Well, since then, since the company separated and since the plants separated and now they are owned by two different companies, Mr. Kincaid stated time and time again that it was still binding, it didn't matter what the organic plant did with their part of the agreement, that we still had ours and we could go to the organic plant if we got laid off. That was kept in our contract.

...

Q In the complaint, it is alleged that in May of 1991, the local union informed employees at the phosphate plant that ICI was demanding the deletion of the September 13 Memorandum of Agreement, but it would have no effect on the employees at the Rhone-Poulenc plant. Did someone tell you that?

A Yes, sir.

Q Who told you that?

A Mr. Kincaid.

Q When did he tell you that?

A Time and time again.

Q Give me a specific date, if you remember.

A He stated it at the union meetings, he stated it at the negotiations for the severance package, he stated it at the negotiations for the drug abuse policy, he stated it at the meetings we had setting up an apprentice program. Any time the subject came up, that's what he told us.

Q And did he tell you that that would have been true if employees had been laid off prior to the time that that language was deleted from the ICI contract?

A No, sir. He said that the language in the ICI contract had no bearing on what happened to our contract.

Q Do you know whether he had sought legal advice and an opinion on the validity of what he was telling you prior to June of 1991?

A The union was paying you big bucks. I don't know why you wouldn't have told him.

...

Q When were you first informed that the Rhone-Poulenc employees no longer had transfer rights?

A It was the Monday after the negotiations was settled with ICI, the meeting Mr. Kincaid couldn't remember, is when he told us that he dropped the lawsuit and that we had no other rights.

...

Q There is nothing Rhone-Poulenc could have done to force them to take you, is there?

A No, sir, I don't agree with that.

Q Why do you not agree with that?

A Rhone-Poulenc could have taken other action to see that we were employed with ICI.

Q What other action are you saying that Rhone- Poulenc could have taken?

A They could have gone through the Courts.

Q So it is your statement, then, that it was Rhone-Poulenc's duty to file a lawsuit to get you a job at ICI?

A Yes, sir, or whatever it took.

Q And is that part of what you claim to be a breach of the union's duty, also, that the union didn't take steps to force ICI to take you?

A Yes, sir, or the union, too, when it didn't -take some action to force Rhone-Poulenc to try to force ICI to take us.

Q Did any lawyer ever tell you that's what the local union should have done?

A It's in our contract they have to uphold the contract, and they didn't uphold it, but to answer your question, no, I haven't talked to an attorney other than Mr. Steiner.

Q Is it your position that the June, 1991, Collective Bargaining Agreement that ICI has with Local 912 is void if it attempts to delete the September Memorandum of Agreement from 1982?

A I don't think they had the authority to delete that memorandum from their contract, if that answers your question.

Q Really my question is whether you have an opinion as to whether that deletion was valid or not.

A No, sir, I don't believe it was valid.

Q What do you base that opinion on? A That there's three people involved, and two people

negotiated out a three-party -- two parties negotiated a three-party agreement.

...

Q In the complaint, you allege that the union, Local Union 912, had a conflict of interest in June of 1991. What was that conflict of interest?

A They were representing the employees at the organic plant and they were representing the employees at the furnace plant, and one was going to be let go, and they were representing both parties.

Q What do you think the local union should have done in this situation?

A They should have either followed the contract or really they should have set up another local and had representation from two people.

...

Q Also, in Paragraph 21 of the complaint as amended, you and the other plaintiffs state

that the union breaching its fiduciary duty of trust to the plaintiffs. How was the union breaching its duty of trust to you and the other plaintiffs?

A Telling us one thing and it not being true.

Q What else do you claim was a breach of the union's duty to you?

A Not fulfilling our contract.

Q How did the union not fulfill your contract?

A They dropped the grievance against Rhone-Poulenc. They would not file a grievance with the organic plant.

...

Q Paragraph 23 of the complaint states that the union defendants failed to enforce plaintiffs' vested contractual rights and process valid grievances. How did the local union fail to enforce your contractual rights?

A They dropped the grievance.

Q Other than, as you say, dropping the grievance, what else did the local union fail to do to enforce your contractual rights?

A They didn't represent us in ICI negotiations.

...

Q You allege in the complaint that the local union acted arbitrarily toward the employees of Rhone-Poulenc. What did the local union do that was arbitrary as concerns you and the other plaintiffs?

A They were representing two different people.

Q Is there anything specifically that you state shows that the union treated you or the other plaintiffs in an arbitrary way?

A They wouldn't go on with the grievance against Rhone-Poulenc. They are telling us one thing, and then when it is too late to do anything about it, they tell us, "No, I'm wrong."

Q Is there anything else?

...

Q ...What information do you have that the international union played any role at all in those decisions?

A. They were contacted by the union.

Q. By what union?

A International was contacted by Mr. Kincaid.

Q When was that?

A That was in June of '90, I believe. He wrote a letter asking for help.

Q What was the response?

A "We're not giving you any," is what I gathered from the response.

Q Wasn't the response that you recall from the president saying that this was a matter of collective bargaining, that it was the responsibility of the local union?

A Isn't that the same thing as, "we're not going to help you"?

...

Q Isn't your only information or allegation that the international should have done something about that?

A Yes, sir, I believe they should have done something.

Q What do you base that on?

A Constitution. The international is supposed to see that the local unions uphold the contracts that it's got.

Q That's despite what the general president says?

A I can't help what he says. You asked me what I felt, and that's what I felt.

Q But you don't have any facts to base it on, other than your opinion, do you?

A The constitution.

...

The deposition of MR. JAMES B. KINCADE, a witness called at the instance of the Defendants, for use in notice of evidence in the above-entitled cause, taken pursuant to Rule 26, et seq., of the Tennessee Rules of Civil Procedure, taken on the 27th day of May, 1992, in Nashville, Tennessee, at the office of Mr. Dewey Bransstetter, Jr., Esquire, In Nashville, Tennessee, before Karl A. Hall, Notary Public at large and Court reporter, pursuant to the stipulation of counsel.

...

Q. And didn't you tell the bargaining unit that one unit can't bargain away the rights of the other unit?

A. (Pause.) I, probably, made that statement many times. In my opinion, and under the laws of equity, I felt that it was three parties had reached the agreement and it would take all three parties to negotiate or to negotiate any part of it away. ...

...

Q. Did you also take the position during the 1988 negotiation with I.C.I. where they wanted to say the Memorandum Agreement was in no effect; the bumping agreement? Did you tell them that they have purchased the liabilities as well as the assets? That was your position, in general, wasn't it?

A. Yes, sir.

Q. That that was a liability of that particular plant and they were liable under it with that Agreement?

A. That was my position to Dobbins that when I.C.I. purchased the plant from Uni-Lever, I believe, that they purchased the liabilities as well as the assets. And if that was considered a liability, then they had it, because they had bought it.

...

Q. Now, in the period beginning in 1990, after you received notice that Rhone-Poulenc

was going to have this closing, you told the bargaining unit for the Rhone-Poulenc plant that it didn't make any difference what I.C.I. did, because I.C.I.'s bargaining unit could not bargain away their rights?

A. That's right.

Q. Did you know that Bennie Splain also participated in the 1985 negotiations?

A. I understood that he did. To know it for a fact, no, I didn't know it.

Q. Okay. Did you have any representatives of the International Union in the 1988 negotiations?

A. Yes.

Q. Who was that?

A. Bill Brewer.

...

Q. Did you have any telephone conversations with any member of the International Union in relation to this matter?

A. I talked to a couple of attorneys on the staff in Washington. Richard Griffin, I believe, and, I believe, Helen Morgan. I had called to talked with Mike Fanning and Mike wasn't in. So, I talked to two of his subordinates.

Q. When was this?

A. I don't know. It was after I had written a letter.

Q. Was it before the reply or after the reply?

A. I don't remember whether it was before or after.

Q. From the date of the reply of July 27th, until the date suit was filed, October 16, 1990, did you talk or have any communications with any representative of the International Union?

A. (Pause.)

MR. BRANSTETTER: Frank, what were those dates, again?

MR. STEINER: July 27, 1990, to October 16, 1990.

MR. KINCADE: Did I talk with anybody from the International Union --

BY MR. STEINER:

Q. Yes.

A. Pertaining to the dilemma that I had?

Q. Yes.

A. I probably did. I don't recall. That occupied about 90 percent of my time for a good three months there. And I, probably, did. If I talked with them, I, probably, mentioned it.

Q. And did you tell them you were contemplating this suit? The suit that was filed October 16, 1990?

A. You talking about the Declaratory Judgement suit?

Q. Yes.

MR. BRANSTETTER: To whom was he speaking?

MR. STEINER: Pardon?

MR. BRANSTETTER: To whom was he speaking?

MR. STEINER: He said he was talking to some members of the International Union. Some representatives.

MR. KINCADE: I said, I may have. I don't -- I don't recall, specifically, talking to anyone about it. If I talked with any about anything, it may have come up, you know, what the status of the suit.

...

Q. Mr. Kincade, the question I'm asking you know, and it's for a yes or no answer, did you ever advise the Plaintiffs that there was a possibility of settling the Declaratory Judgement action on the basis of priority hiring?

A. No.

Q. But, if they went to the Organic Plant and didn't qualify, they would be eligible for severance pay, wouldn't they?

A. Yes. In fact, the clause says, "Qualifying for a position at the Organic Plant will make an individual ineligible under this Memorandum, whereas failure to qualify for a position at the Organic Plant will not make an individual ineligible." (Reading.) This is what I've already testified to that was the -- they couldn't get their layoff allowance if they placed themselves under the Memorandum.

Q. But, they had the right to do either one?

A. Yes.

Q. Under --

A. In April, at that time.

Q. They had the right to pursue their job at the Organic plant, also, and the, if they didn't qualify, they would get severance pay?

A. Right. This was in April of '91.

Q. And that was put in especially because of the cross bumping agreement?

A. There was a lot of discussion about the severance and those who placed themselves, I think, the committee was in complete agreement that if an individual placed themselves under the Memorandum, then he was ineligible for severance.

Q. But, that --

A. If he didn't, then he ought to be eligible for it.

Q. But, that clause was put in just because of the bumping agreement?

A. It was because of the bumping agreement, yes.

...

Q. Do the union members pay dues?

A. Certainly.

Q. How much are they?

A. Seventeen, seventy-five, currently.

Q. How much of heat goes to the International?

A. Six dollars.

Q. Is that each month?

A. Each month.

Q. So, out of the dues you receive, you send six dollars for each member?

A. That's correct.

...

Q. During the 1988 negotiations with both I.C.I. and R.P., it was your position that they were successor and fully bound by this Memorandum of cross bumping agreement of September 13, 1982?

A. That's correct.

Q. And once they signed the 1988 agreement, both of them, you didn't have any question that they were a successor and bound by those two agreements, did you?

...

A. It was my contention that I.C.I. had the liability, if that's the way you want to term it, to honor the Memorandum of Agreement.

Q. They were a successor under --

A. That was my contention. They were a successor.

Q. And bound by the contract?

A. Right. They had bought the assets as well as the liabilities.

The Deposition of

ROBERT R. FARMER

...

Q Did you understand that by accepting severance pay and signing that waiver that employees were releasing all claims that they had against Rhone-Poulenc except for workers compensation and unemployment compensation claims?

A And the roll to the organic plant.

...

Q Mr. Farmer, show me where it excepts in paragraph B of III, where it says, "releases any and all obligations and liabilities," where it excepts any rights to roll.

A Well, it's under the terms of this Memorandum of Understanding.

...

Q So you're referring to the paragraph that says --

A Qualifying for a position with the Organic Plant will make an individual ineligible.

Q "Under this Memorandum, whereas failure to qualify for a position at the Organic Plant will not make an individual ineligible"?

A That's how I understand it.

...

Q Explain to me why it would be an easier way out for the union?

A Well, they had a conflict of interest that had been going on since the plants split, so they didn't have any way to get out of this conflict of interest unless this was delayed long enough to get it out of one of the contracts.

...

Q Do you have anything else that you can add to the answer that he gave as to why he thought Local 912 had failed to fairly represent you and the other plaintiffs?

A Well, the best I remember, in December of '90, they got a letter from ICI saying they'd give us preference hiring or something. Well, we never knew anything about that. Plus we never knew anything that was going on. Nobody ever told us nothing about none of that.

...

Q And you were not covered by the collective bargaining agreement between Local 912 and ICI?

A Yeah, I was still covered under it.

Q In what way were you covered under it?

A Because they removed my third-party rights without even conferring with me.

Q In August of 1991, what part of the collective bargaining agreement between ICI and Local 912 applied to you as an employee of Rhone-Poulenc?

A They took out the part that applied to me without my consent.

Q And that's what you claim was a breach of duty that the union did?

A That's right.

Q And that's why you're claiming the Union should have filed a grievance on your behalf?

A That's right. If it was going to affect me, I should have been represented in the meeting.

...

Q What did the International do to breach its dusty to fairly represent you, if it had one?

A They had one.

Q How did the International have a duty to fairly represent you?

A Because they were supposed t uphold our contract just like the Local. We paid them dues every month, too, $6.00 a month.

Q So the basis of your claim against the International is that you paid them a per capita every month of $6.00?

A That's right. I was a member of it.

Q And they had a duty to uphold the contract?

A That's right.

Q Do you have evidence that --

A It's in that book right there, the constitution of the International Union.

Q And that is the sole basis upon which you make that statement. Is that correct?

A That's right.

Q And how did they breach that duty?

A They didn't give us any help when we asked for it, when we wrote them letters to ask for it. They've been involved. They knew about all this when it started, that it was going to happen one day. They knew our contract. It's their job to know our contract. And if they didn't know it, they're not doing their job.

...

Q Now, you did tell Mr. Branstetter, I believe, that you had some rights that vested in 1977?

A No, they vested when the plants split in 1982. Those were vested rights that wasn't supposed to be taken away.

Q How did those rights vest?

A They vested when the plants separated. The new employees didn't get those rights. The other employees retained those rights for one time in a lifetime. That's all you ever got to use them. They vested.

Q Is it your position that those rights could not be negotiated away?

A Not without having all the parties involved there, no, they couldn't.

Q Your position is that those rights cannot be negotiated away unless they have all the parties there?

A That's right.

...

Q Did the International have anything to do with your rights vesting in 1982?

A Yes. They was aware we had vested rights.

Q Excuse me, excuse me. Do you understand my question? I'm not asking you if they were aware. I'm asking you what role, if any, did they play in your so-called vesting of your rights in 1982?

A They had a man there when that was negotiated.

...

Q Thank you. So your position is by having a man there, the International, when those negotiations took place impressed upon the International an obligation?

A They were obligated when they accepted us as members.

...

Q I have some questions based on some things you were just talking about, Mr.

Farmer. As I understand it, you don't think the process by which this thing was taken out of the ICI contract was proper. Correct?

A Right.

Q Because you say that all parties have to be involved?

A That's right.

EXHIBIT
NO. 28
Karl Hall 5-27-92
Court Reporter

August 18, 1982

Mr. M. C. Hargett, Regional Director
International Union of Operating Engineers
5700 Brainard Road, Suite 214
Chattanooga, Tennessee 37411

Dear Sir and Brother:

Re: Strike Sanction at Stauffer Chemical Company, Mt. Pleasant Tennessee Plant

International Union of Operating Engineers, Local Union NO. 912's contract with Stauffer Chemical Company expires Saturday, September 11, 1982, at 3:00 P.M.

The parties meet Friday, August 20 to begin Negotiations. We then meet August 31, September 1, 2, 3, 7, 8, 10 and 11.

Local Union 912 has, currently, 347 members at the Company's Furnace and Organic plants. These two plants are under one contact. There are 221 members at the Furnace plant. The Organic plant has 126.

The Furnace plant's main product is elemental phosphorus, with slag and metal as a by-product.

The Organic plant's products are intermediates derived from phosphorus which are further refined to be used in the making of herbicides, insecticides, and pesticides.

Historically we have negotiated two-year contracts. In each negotiation the Company

has always had a proposal to separate and negotiate separate Agreements between the parties for the Furnace and Organic plants. This has always ben a strike issue with us for several reasons.

The first reason is that it would cut our bargaining power in half. The Company always, if a strike occurs attempts to operate with salary employees until a settlement is reached.

Secondly, the Union would have to have separate negotiations, separate meeting dates, etc., which would further increase our costs and tie up more of my Assistant's and my time. Time which we do not have to spare.

Last Friday, August 13, the Company's negotiator called me and told me to expect the Company's proposal to separate the plants; and

that this time the company meant to achieve the separation - even withstanding a long drawn out strike if necessary.

In my opinion, if the Company is not bluffing, the separation of the plants issue, will cause a strike.

Separation of the plants would affect the job security of all 347 employees. Now, hiring is done through the Furnace plant and the posting of jobs and reductions are done within both plants. If they were separate, one plant could be hiring, with the other plant laying off. You see what this would do to us.

This issue, along with the hardening of Stauffer's attitude, and the over-all economic situation could cause us some problems.

I thus request two things: One is some assistance from one of your staff, if you have one to spare; and secondly, strike sanction if it comes to that.

Thank you.

Fraternally,

/s James B. Kincade
James B. Kincade
Business Manager

JBK:fr

INTERNATIONAL UNION OF OPERATING ENGINEERS
LOCAL UNION NO. 912

(LOGO)

September 14, 1982

Mr. J.C. Turner, General President
International Union of Operating Engineers
1125 17th Street, N.W.
Washington, D.C. 20036

Mr. M.C. Hargett, Regional Director
IUOE, Region NO. 4
5700 Brainard Road
Suite 214
Chattanooga, Tennessee 37411

Dear Sirs and Brothers:

I am most grateful for your granting my request for "strike sanction" for the three contracts, Stauffer, Allied, and Stauffer Globe plant, that I had requested.

The Negotiating Committee, Brother Bennie Splain, and I were able to negotiate and reach a settlement with Stauffer at the Furnace and Organic Plants in Mt. Pleasant, Tennessee, on Saturday, September 11, after some of the hardest bargaining that I have encountered.

I am most appreciative for the help and expertise of Brother Splain. I, of course, knew that Brother Splain could be of immense help in reaching an agreement. He was!

Attached are copies of the Interim Agreements of the settlement. The settlement left a lot to be desired, but under all the circumstances: The Company's adamancy, the overall economy, etc., we were fortunate, in my opinion, to reach a settlement.

Again, thanks for your help and support.

Fraternally,

James B. Kincade
Busines Manager

INTERNATIONAL UNION OF OPERATING ENGINEERS
LOCAL UNION NO. 912

(LOGO)

November 5, 1985

Mr. M. C. Hargett, Regional Director
International Union of Operating Engineers
Suite 214 Brainard Building
5700 Brainard Road
Chattanooga, Tennessee 37411

Dear Brother Hargett:

Strike Benefits Stauffer Chemical Organic Plant, Mt. Pleasant, Tennessee, Local Union No. 912 - 136 members

A-352

I am requesting strike benefits for the week ending October 29 for 136 employees of Stauffer Chemical Company's Organic Plant. I am enclosing the signature sheets for the weeks of Oct. 2-9.

The Company, Union representatives, and Chuck Todd met on October 31. The membership then met on Friday and voted 71 to 36 to accept the Company's offer, and return to work November 4, 1985.

The final wages over three years - 0 - 2 3/4 - 2 3/4. There was some contract language change on overtime.

I appreciated the assistance of Brother Splain during the negotiating sessions.

Fraternally,

/s Wray H. Wright
Business Manager

WHW.:fr
Encls.

Field Representatives Activity Report

INTERNATIONAL UNION OF OPERATING ENGINEERS

1125 SEVENTEENTH ST., N.W.

WASHINGTON, D.C. 20036

REPORT OF Bennie L. Splain, Jr.

TITLE: International Representative

FOR THE TWO WEEK PERIOD August 15, 1982

TO August 28, 1982

Report on this form only a concise summary of your daily activities. Detailed reports should be filed by individual letter if a specific situation requires.

REGIONAL

DIRECTOR

OMISSIONS

DATE August 26,

I met in Columbia, Tennessee with James Kincade, Business Manager, Local 912, and George Limberg and Jon St. Clair of Stauffer Chemical Corporation, regarding the company's proposal to separate the Furnace Plant and the Organic Plant in agreement that is to be negotiated.

OMISSIONS

/s Bennie S. Splain, Jr.
SIGNATURE

Jackson, Mississippi 30209
CITY ZONE STATE

Field Representatives Activity Report

INTERNATIONAL UNION OF OPERATING ENGINEERS

1125 SEVENTEENTH ST., N.W.

WASHINGTON, D.C. 20036

REPORT OF Bennie L. Splain, Jr.

TITLE: International Representative

FOR THE TWO WEEK PERIOD August 29, 1982

TO September 11, 1982

Report on this form only a concise summary of your daily activities. Detailed reports should be filed by individual letter if a specific situation requires.

REGIONAL

DIRECTOR

OMISSIONS

DATE September 7

I was assigned to contract negotiations between Local 912 and Stauffer Chemical Company.

DATE September 8

I was assigned to contract negotiations between Local 912 and Stauffer Chemical Company.

DATE September 9

I was assigned to contract negotiations between Local 912 and Stauffer Chemical Company.

DATE September 10

I was assigned to contract negotiations between Local 912 and Stauffer Chemical Company.

DATE September 11

I was assigned to contract negotiations between Local 912 and Stauffer Chemical Company.

/s Bennie S. Splain, Jr.
SIGNATURE

Jackson, Mississippi 30209
CITY ZONE STATE

Field Representatives Activity Report

INTERNATIONAL UNION OF OPERATING ENGINEERS

1125 SEVENTEENTH ST., N.W.

WASHINGTON, D.C. 20036

REPORT OF Bennie L. Splain, Jr.

TITLE: International Representative

FOR THE TWO WEEK PERIOD October 20, 1985

TO November 2, 1985

Report on this form only a concise summary of your daily activities. Detailed reports should be filed by individual letter if a specific situation requires.

REGIONAL

DIRECTOR

A-359

OMISSIONS

DATE October 28

I drove to Columbia, Tennessee and met with Local 912's negotiating committee regarding contract negotiations with Stauffer Chemical Company - Organic Plant.

DATE October 29

I worked in Local 912's Columbia, Tennessee office preparing for negotiations with Stauffer Chemical Company and working on contract language and proposals for negotiations with Rhone-Poulenc, Inc.

DATE October 30

I met with John St. Clair of Stauffer Chemical Compan;y regarding Company movement and to explore possibilities of settlement.

DATE October 31

I was involved in contract negotiations between Local 912 and Stauffer Chemical Companay. We reached a tentative agreement subject to the approval of the membership.

DATE November 1

I attended a meeting of the Stauffer Chemical Company - Organic Plant employees to explain the tentative agreement.

Employees voted 71 to 36 to accept the Agreement.

OMISSIONS

/s Bennie S. Splain, Jr.
SIGNATURE

Jackson, Mississippi 30209
CITY ZONE STATE

Field Representatives Activity Report

INTERNATIONAL UNION OF OPERATING ENGINEERS

1125 SEVENTEENTH ST., N.W.

WASHINGTON, D.C. 20036

REPORT OF Garland Brewer

TITLE: International Representative

FOR THE TWO WEEK PERIOD 10-2, 1988

TO 10-15, 1988

Report on this form only a concise summary of your daily activities. Detailed reports should be filed by individual letter if a specific situation requires.

REGIONAL

DIRECTOR

OMISSIONS

DATE 10-4-88

Enroute to Columbia, Tn. where James Kincaid, Buis. Mgr. Local 912 and I attended negotiatioins with Stauffer Chemical Co. for a new agreement. I returned to Nashville, Tn. where I spent the night.

DATE 10-5-88

Same as 10-4-88.

DATE 10-6-88

Same as 10-4-88.

DATE 10-7-88

Same as 10-4-88.

OMISSIONS

DATE 10-11-88

Enroute to Columbia, TN. where Local 912 and I continued negotiations for a new agreement with the Stauffer Chemical Co. I returned to Nashville, TN. where I spent the night.

DATE 10-12-88

Same as 10-11-88.

DATE 10-13-88

Same as 10-11-88.

DATE 10-14-88

Same as 10-11-88. We reached an agreement. I reported to Regional Director B. L. Splain. Enroute to Camden, Tn.

OMISSIONS

/s Garland Brewer
SIGNATURE

Camden, Tennessee
CITY ZONE STATE

THE CONSTITUTION

THE INTERNATIONAL UNION

OF

OPERATING ENGINEERS

ARTICLE I

NAME, PURPOSES, GOVERNMENT

AND RITUAL

Name

Art. I. Section 1. This organization shall be known as the International Union of Operating Engineers and it shall be the policy of this organization to be affiliated with the AFL-CIO and such of its departments as this organization may deem expedient.

Purposes

Art. I. Section 2. The objects and purposes of this organization are to elevate the trade of operating engineers (by which trade the membership thereof earn a livelihood for themselves and their dependents) to its proper position in all industrial activity and the

ranks of organized workers; to encourage a higher standard of skill among its members; to cultivate feelings of friendship among the men of the craft and those who may employ its members; to organize all persons working in the jurisdiction of this International Union without regard to race, creed, color, sex, religion, age or national origin to promote the health, welfare and safety of its members and their families; to promote, foster and develop apprentice programs, training programs and other means to advance the skills, efficiency and working knowledge of its members; to assist its members in securing and stabilizing employment; to assist employers in obtaining skilled craftsmen; to secure improved wages, hours, and working conditions through assisting afiliated Local Unions in negotiating collective bargaing agreements and through legislative action and other appropriate means; to further, directly and

indirectly, the joint interest of thc members of the International Union in the betterment of general economic and social conditions in the world, by engaging in legislative, political, educational, civic welfare, and other appropriate activities; while preserving the integrity and autonomy of this International Union, to work within the AFL-CIO and to cooperate with other International Unions for the advancement of the entire labor movement, and to assist and cooperate with free and democratic labor organizations throughout the world; to provide aid and assistance for, and to bring about cooperation and coordination of effort among affiliated Local Unions; to insure the better protection of life and property by securing the enactment of state, provincial and city Engineers' License Laws and by other appropriate means; and to protect and strengthen our democratic institutions and to vigorously oppose the

efforts of those who advocate the overthrow of the established order, either of government or of this organization, by force or violence or subversive tactics.

Government

Art. 1. Section 3. The International Union of Operating Engineers shall be governed by the following bodies:

1. General Convention
2. General Executive Board
3. Officers
4. Board of Trustees
5. State and Provincial Organizations
6. Joint Executive Boards
7. District Councils
8. Parent Local Unions

and each of such bodies shall constitute a distinct entity each with its own separate identity but functioning in conformity to the Constitution and Ritual...

OMISSIONS

ARTICLE III

GENERAL CONVENTIONS

Powers

Art. III. Section 1. All the sovereign power, including the legislative, executive, administrative and judicial, of the International Union of Operating Engineers shall be vested in its General Convention when in session. Specifically, but not in limitation of the power thus vested, the General Convention may grant and issue charters for Local Unions and subdivisions thereof and local State and Provincial organizations and such other subdivisions of the International Union as from time to time may be deemed advisable; set the cost for said charters and necessary supplies issued with said charters; suspend and revoke any of said charters; adopt and issue a seal for the International Union, its General Officers, its Local Unions, local, State and Provincial

organizations and any other subdivisions; adopt, print and issue dues books and/or cards for the use of the membership; print and issue per capita tax dues stamps and collect for same; print, issue and mail an official journal; print and issue such books, stationery, supplies and paraphenalia and sell the same to affiliated Local Unions, local State and Provincial organizations and any other subdivisions for the proper keeping of their records and affairs; invest the funds of the International Union; buy and sell real estate (improved or otherwise) and bonds and other securities; establish, impose and collect per capita tax; establish, impose and collect assessments upon members, charter applicants, Local Unions, local, State and Provincial organizations and any other subdivisions as hereinafter provided; impose an initiation fee and an initiation fee tax; establish a Defense Fund and pay strike

benefits; establish, revise, amend and from time to time change the Death Benefit Fund and pay regulated benefits therefrom; supervise the operation of Local Unions, local, State and Provincial organizations and any other subdivisions and appoint supervisors and receivers when necessary; prefer charges against Local Unions, local, State and Provincial organizations and any other subdivisions and officers (individually or collectively) or their members (individually or collectively) and order trials with authority to discipline those affected; prefer charges and order trials with authority to discipline any General Officer or any member of the Board of Trustees; register, copyright and trademark the name of its official journal, its emblem and any document of the organization; establish and maintain a general headquarters in Washington, D.C.; employ clerical and other help; employ organizers and

deputies; confiscate and sue for the possession of all real and personal property, paraphernalia, books, charters, records, card indexes, seals and funds of a Local Union, local, State or Provincial organization and any other subdivision; establish a General Executive Board with full powers of the Convention between Conventions; include and adopt as part of the Constitution a procedure for the government and regulation of Local Unions, subdivisions thereof, local, State and Provincial organizations and any other subdivisions; establish, define, segregate, assign and amend craft jurisdiction and territorial jurisdiction to which Local Unions, their subdivision, local, State and Provincial organizations and any other subdivisions already established or hereinafter chartered shall confine their activities; establish, enter into, amend or abrogate understandings or written agreements

with other craft unions affiliated with the AFL-CIO; amalgamate competitive craft unions with the International Union of Operating Engineers and by such amalgamation compel all individual officers and member of the amalgamated union to be subservient to the Constitution, amendments thereto and decisions and orders of the General Executive Board and the General President of the International Union; review and decide appeal from decisions properly filed with it; provide for the general welfare of the organization and its members; take all steps necessary to protect the interests of the organization; make all disbursements necessary or appropriate in the exercise of the above powers or in the fulfillment of the objects and purposes of the International Union together with all other rights, powers, privileges and immunities not herein specifically denied.

OMISSIONS

ARTICLE VI

POWERS AND DUTIES OF THE GENERAL PRESIDENT

As Presiding Officer of Convention

Art. VI. Section 1. It shall be the duty of the General President to preside at all meetings of the General Convention. At least thirty (30) days prior to the holding of a General Convention he shall publish all decisions rendered by him during his term of office and shall mail copies of same to each Local Union in sufficient numbers to allow a copy for each delegate to the Convention.

To Review Cases and Interpret Laws, Etc.

Art. VI. Section 2. He shall review all cases, complaints and charges filed with the General Executive Board or the General Secretary-Treasurer. He shall be empowered to render decisions on the merits of such cases,

complaints and charges and his findings on the facts shall be final and conclusive. He shall also be empowered to interpret the provisions of the Constitution and decide questions of law arising thereunder. He shall be vested with all the administrative powers of the organization.

To Invoke and Administer International Supervision , and Other Peremptory Powers

Art. VI. Section 3. The General President shall have the power to require Local Unions, Local Officers and any other subdivision of the International Union and members to comply with this Constitution and any lawful rulings or orders of the International Union. For the purpose of correcting corruption or financial malpractice, assuring the performance of collective bargaining agreements or other duties of a bargaining representative, restoring democratic procedures, or otherwise carrying out the legitimate objects of the International Union, including the observance

of the Ritual, Obligation, law, rules or decisions of the organization or its duly constituted authorities, he shal have full power to suspend or remove such Local officers suspend or revoke charters of such Local Unions or place such Local Unions and their officers and members under International Supervision. He shall have power to designate and appoint persons to fill the places of those Local officers of Local Unions suspended, removed or placed under International Supervision, which appointees shall conduct the affairs over which they have been appointed for such time and in such manner as he may direct. All of the business, finances, affairs and government of any Local Union whose charter shall have been suspended by the General President or shall have been placed under International Supervision by him, shall be fully and completely conducted and administered by the General President or his

deputy "hereunto appointed with full power of control therein and thereover. During such suspension or International Supervision all rights and powers of the Local Union to conduct its own affairs shall be suspended. He or his deputy shall countersign all vouchers and checks for payment of monies or for withdrawing funds from the bank. He shall have power to appoint Local officers pro tem and all committees not otherwise provided for, to deputize any member in good standing to perform any of the powers and duties of his office.

Whenever the General President exercises his power under this Section to suspend or remove Local officers, suspend or revoke charters of Local Unions, or place such Local Unions and their officers and members under International Supervision, a hearing shall be held before him, or his authorized representative, to determine the necessity for

taking such action, with the General President making the ultimate decision. Reasonable notice of such hearing shall be afforded the officers and members of the subordinate union involved. If the General President determines that an emergency exists requiring immediate action to be taken prior to a hearing, he may take such action, but the hearing shall be held within a reasonable time thereafter. In all other cases the action will not be taken until a hearing has been held.

Failure of the General President to exercise the authority vested in him under this Section shall not in itself be considered as authorization for, or ratification or condonation of, any act or any failure to act on the part of any Local Union or other subdivision of the international Union, or their officers, employees, members or agents.

To Issue Charters, Etc.

Art. VI. Section 4. He shall be vested with full discretionary power to issue charters. He shall have power to appoint Representatives of the International Union in such localities as shall appear to him to be for the best interest of the organization.

As Chairman of General Executive Board, Etc.

Art. VI. Section 5. He shall preside as chairman of the General Executive Board and shall make a full report of the work in his office at each Board meeting. He shall devote his full time to the duties of his office. He shall have power to call upon any and all subdivisions, officers and member for assistance and advise when occasion demands or requires it. He shall be strictly accountable and responsible for the faithful performance of his duties and shall administer and enforce every law, rule, regulation and requirement of the Constitution, Ritual and Obligation. He

shall be vested with unlimited discretion in the application and administration of his powers and duties. He shall be vested with such other powers and duties as the General Executive Board may from time to time specifically delegate to him.

OMISSIONS

To Make Visitations

Art. VI. Section 8. Should any Local Union be involved in trouble or submit grievances to the General President or the General Executive Board, the General President shall visit such Local Union in person or send a deputy.

Vested With All Powers of General Executive Board in Interim, Etc.

Art. VI. Section 9. All powers heretofore vested in the General Executive Board when in session shall, when the same is not in session, pass to and vest in the General President. All of the acts and decisions of

the General President shall be reviewable by the General Executive Board and shall continue in full force and effect until revoked by action of the General Executive Board.

OMISSIONS

ARTICLE X

MEMBERSHIP

Qualifications

Art. X. Section 1. Any engineer engaged in the craft over which this organization exercises craft jurisdiction, or other person who may qualify to become a junior engineer, assistant engineer, or registered apprentice engineer therein, and any other engineer engaged as an inspector of boilers or other machinery or as an examiner of engineers, or any other person, may upon application, acceptance and initiation in the manner and form required in this Constitution, become a member of the International Union of Operating

Engineers. No person who is otherwise eligible under The qualifications fixed herein, but who is opposed to organized labor, shall be admitted to membership No person shall be denied membership on the basis of race, creed, color, sex, religion, age or national origin.

No applicant for membership shall apply to or be accepted by any Local Union other than the one within the jurisdiction in which he is emoloyed unless such Local Union shall consent to his afiliation therewith.

Minimum and Maximum Initiation Fees and Dues

Art. X. Section 2. The minimum initiation fee in all Local Unions shall be not less than Five Dollars ($5.00) per applicant. *The minimum monthly dues in all Local Unions that do not charge administrative, supplemental or working dues, shall not be less than Eleven Dollars ($11. 00) per month per active member; Eleven Dollars and Fifty Cents ($11.50) per active member as of July 1, 1988; Twelve*

Dollars ($12.00) per active member on and after July 1 1989; Twelve Dollars and Fifty Cents ($12.50) per active member on and after July 1, 1990 Thirteen Dollars ($13.00) per active member on and after duly 1, 1991; and thereafter, when the per capita tax payable to the International Union is increased pursuant to the provisions of Article XI, Section 1, the minimum dues shall be increased in a corresponding amount. Maximum initiation fees and maximum dues charged by Local Unions to their applicants or members may, from time to time, be fixed by the General President.

No proposed increase in initiation fees may be voted upon by a Local Union unless and until the proposed increase is approved by the General President.

ARTICLE XI

INCOME OF INTERNATIONAL UNION

Per Capita Tax

Art. XI. Section 1. Each Local Union must pay the General Secretary-Treasurer a per capita tax of *$4.50* per month for each member oF the Local Union and its Subdivisions *($5.00 for each member on and after July 1, 1988; $5.50 for each member on and after July 1, 1989; $6.00 on and after July 1, 1990; $6.50 on and after July 1, 1991)* who has not been reported to the General Secretary-Treasurer as suspended, withdrawn, transferred or expelled, and in addition an amount equal to the per capita tax must be paid for each person making payments to the Local Union in lieu of dues under agency shop or similar provisions. The per capita tax report signed by the Financial Secretary must be transmitted to the General Secretary-Treasurer on or before the fifteenth day of the month following that for which the per capita tax is due.

A payment computed on the closing membership for the month *($4.50 for each*

member; $5.00 on and after July 1, 1988; $5.50 on and after July 1, 1989; $6.00 on and after July 1, 1990; $6.50 on and after July 1, 1991) and the initiation fee tax (25% of the current initiation fee) on each member initiated for the month, must be submitted with the per capita tax report. Thereafter, the General Secretary-Treasurer shall transmit to the Financial Secretary a receipt for the initial amount remitted with a statement covering the remaining amounts due for the month for which the per capita tax was filed for assessments and back per capita tax on suspended members reinstated, expelled members reinstated, members admitted on withdrawal cards, per capita tax for members deducted deceased and members deducted on withdrawal cards and differences of initiation fee tax. The per capita tax due shall immediately be remitted to the General Secretary-Treasurer by the Financial Secretary. The General Secretary-

Treasurer shall return a receipt covering payment of balances due.

However, if in the judgment of the General Executive Board, a different form of billing procedure may be desired, such change may be made by the Board.

Notwithstanding the above, the General Executive Board shall have the authority, *to set aside the per capita tax increases otherwise effective July 1, 1990 and July 1, 1991, if it determines such action to be in the best interest of the organization.*

*****OMISSIONS*****

Initiation Fee Taxes and

International Initiation Fees

Art. XI. Section 4. The Financial Secretaries of Local Unions shall forward to the General Secretary-Treasurer with the report required by this Article for the month in which new members have been initiated into

membership in the Local Union or any subdivision thereof the following for each newly initiated member:

Initiation Fee Tax–*Twenty-five* (25) percent upon the initiation fee established as of the date of reporting the new member. The initiation fee shall be deemed to include all fees, assessments and other charges required to be paid upon admission to membership, howsoever identified, but shall not be deemed to include any assessment for the maintenance of a Local Union death benefit fund.

Reinstatement Assessments

Art. XI. Section 5. The Financial Secretaries of Local Unions shall forward to the General Secretary-Treasurer with the report required for the month in which members are reinstated the following:

(a) Five ($5.00) Dollars for each member reinstated to membership who

has held a withdrawal card as provided in Article XV.

(b) Five ($5.00) Dollars for each member reinstated to membership after suspension or expulsion plus per capita tax for each month required, and such other charges as may be provided for in Article XXIV.

Other Fees, Taxes and Assessments

Art. XI. Section 6. Subject to applicable laws, other fees, taxes, assessments and other charges for obtaining income for the International Union for any purpose may be increased, decreased, changed or added from time to time by the General Convention or the General Executive Board.

*****OMISSIONS*****

ARTICLE XIV

CHARTERS

Classification of Charters

Art. XIV. Section 1. Charters of the International Union of Operating Engineers may be granted to Local Unions, District Councils, Local Joint Executive Boards, Local State and Provincial Organizations, to Local Unions [or Junior and Assistant Engineers' Subdivisions, Registered Apprentice Engineers' Subdivisions, and Branch Engineers' Subdivisions, and to such other subdivisions as may from time to time be authorized and established.

Application for Charters

Art. XIV. Section 2. An application for a charter of a Local Union shall be upon the form prescribed by the International Union of Operating Engineers and shall be *signed by* not less than fifteen (15) applicants none of whom shall be members of the International Union, which requirements may be changed by the International Union. The requirements for all, other applications for charters shall be established by the General Executive Board.

Qualification of Applicants

Art. XIV. Section 3. Upon receipt of an application for a charter, the General President shall proceed to satisfy himself that the applicants are qualified, and if found to be so he shall direct the General Secretary-Treasurer to issue the charter. In the formation of new Local Unions the members thereof shall be charged such charter fees, entrance fees and organization fees as the International Union shall establish.

*****OMISSIONS*****

Property of Local Unions

Art. XIV. Section 8(a). The supplies furnished with a charter for a Local Union will be a voucher and receipt book, one seal, Financial Secretary's book, Treasurer's book, one minutes book, one day book three rituals, one hundred letterheads, one hundred envelopes (stock), fifty application cards and fifteen

copies of the Constitution. Membership books and/or cards, the charter, seal and all books and other paraphernalia shall be the property of the International Union and shall be delivered to the General President of the International Union upon demand by the General Executive Board, or by order of the General Convention.

Art. XIV. Section 8(b). If at any time a Local Union or other subdivision shall withdraw, lapse, dissolve, be suspended, placed under supervision or expelled from the International Union, or shall have its charter revoked, all of its real and personal property, paraphernalia, books, charter, seal, records, card indexes and funds shall immediately revert to the International Union and the General President shall at once, in person or by deputy, take possession of such property, paraphernalia, books, charter, seal, records, card indexes and funds of said Local

Union or other subdivision, all of which he or his deputy shall receipt for, and he or his deputy shall forward the same to the General Office or hold as directed.

Art XIV. Section 8(c). The officers and members of said Local Union or other subdivision, individually and collectively, shall be held strictly responsible for all such property, paraphernalia, books, charter, seal, records, card indexes and funds until they are turned over to the General President or his authorized representative and receipted for.

Art. XIV. Section 8(d). They shall be individually and collectively accountable therefor to the International Union, and suit may be instituted through the General President to recover the real and personal property, paraphernalia, books, charter, seal, records, card indexes and funds, or for money damages

if any of them have been concealed or destroyed.

Art. XIV. Section 8(e). All supplies necessary for the proper functioning of Local Unions shall be uniform, and all Local Unions must secure such supplies from the General Secretary-Treasurer, application to be made therefor, on the official order blank, accompanied by the necessary monies to cover the cost of the same, and no Local Union, under penalty of expulsion, shall furnish any other Local Union with any of such supplies, nor use any such supplies unless furnished by the International Union.

Form of Charter

Art. XIV. Section 9. No charter to a Local Union shall hereafter be granted unless the same shall distinctly state upon its face a description of the territorial and craft jurisdiction conferred, qualified by a statement that such territorial and craft

jurisdiction so conferred may be amended, restricted or enlarged by the International Union. Charters issued in accordance with this Article shall be in such form as the General Executive Board shall prescribe, consistent with the Constitution and laws of the International Union of Operating Engineers.

OMISSIONS

ARTICLE XVI

DISCIPLINE AND EXPULSION

IN GENERAL

Penalty for Issuing Defamatory Literature

Art. XVI. Section 1. In addition to the provisions of this Constitution setting forth the causes and the manner and form in which Local Unions, officers and members thereof may be disciplined and penalties may be invoked, any Local Union, subdivision or member thereof publishing or circulating literature of a defamatory nature in violation of their

responsibility toward the International Union or any of its subordinate bodies as an institution, or engaging in conduct that would interfere with the performance by the International Union or any of its subordinate bodies of their legal or contractual obligations, may be tried by the General Executive Board upon charges filed with it, and upon conviction, may be disciplined or expelled as the General Executive Board may determine.

OMISSIONS

General Executive Board May Prosecute

Art. XVI. Section 3. Any violation of the Constitution, Laws, Obligation and Ritual, or the rules, regulations and edicts issued by any officer or subdivision thereunto authorized by any member, subdivision or officer, may, if not prosecuted by the subdivision thereunto authorized, or if no

provision has been made therefor, be prosecuted, heard and penalized by the General Executive Board.

OMISSIONS

ART. XXIV-SUBDIVISION 3

DUTIES OF MEMBERS

Art. XXIV. Subdiv 3. Section (a). Members of Local Unions shall conform to and abide by the Constitution, Laws, Rules, Obligation and Ritual, and the decisions, rulings, orders and directions of any authority of the International Union empowered by this Constitution to make them. Each member shall keep the Recording-Corresponding Secretary properly and promptly notified of his residence and any change thereof. Consistent with applicable law, each member shall do all in his power to advance the cause of orqanized labor through the encouragement of the use of union goods and services. Members may, upon

proper credentials being produced, obtain admission to meetings of other Local Unions of the organization.

Art. XXIV. Subdiv. 3. Section (b). The admission to membership, in conformity to the Constitution, Obligation and Ritual constitutes a contract between the member, his Local Union, the International Union and every other member therein, whereby, in consideration of the benefits bestowed by such membership, he agrees that he will remain a member until expelled; that he will not violate the Constitution, Laws, Rules, Obligation and Ritual, and the decisions, rulings, orders and directions of the International Union or its subordinate branches, nor the trade rules of the locality in which he works; that he will not enter into the employment of any person conditioned on severing his membership with this organization; that upon the termination of his

membership he will acknowledge his Obligation to be still binding upon him and refrain from doing any act or deed in violation of the principles, Constitution, Laws, Obligation, Ritual and policies of this Organization, and the decisions, rulings, orders and directions of any authority of the International Union empowered by this Constitution to make them.

OMISSIONS

ART. XXIV-SUBDIVISION II

RELATIONS WITH EMPLOYERS

Grievances and Procedures

Art. XXIV. Subdiv. 11. Section (a). No action shall be taken by any Local Union, Local Executive Board, Officer, Committee or Business Representative of a Local Union affecting the relations between an employer and the Local Union or its members unless authorized as hereinafter provided.

Art. XXIV. Subdiv. 11. Section (b). When a difficulty or a dispute arises between an employer and a member or members in good standing in a Local Union such member or members shall first report the same to the Business Representative or the Local Executive Board or the Local Union. The Business Representative, Local Executive Board or the Local Union shall immediately investigate the facts and confer with the employer with a view of adjusting said difficulty or dispute. If no settlement of the dispute has been effected, then the authority investigating the facts connected with said dispute may, if vested with the power to do so, immediately order and direct any necessary action deemed as required under the circumstances, through the removal of the member or members affected, through strike or by stoppage of all work, or by securing a strike of all such other trades and workmen as can be obtained. Where Local Unions

are affiliated with Councils of Labor and like bodies in their respective communities such Local Unions may take such action upon grievances or disputes between employers and employees as shall be recommended or authorized by the Labor Councils and other bodies with which they may be associated regardless of whether such grievances or disputes arise between members of a Local Union in this organization or members of any other union, with employers.

Art. XXIV. Subdiv. 11. Section (c). No Local Union through its Committee, Local Executive Board or Business Representative shall attempt to take or take any action involving a rupture of relations existing under a legal contract with any employer or declare a strike where such contract exists except upon the following reasons, viz:

1. Assisting trade unions or other union workmen.

2. Assisting Councils of Labor or other bodies with which the Local Union is affiliated.

3. Violation by the employer of the written contract.

4. To protect the craft jurisdiction or the territorial jurisdiction of the Local Union.

Nor shall any such action be attempted or taken unless the same has been sanctioned by the General President of the International Union.

Sanction of the General President

Art. XXIV. Subdiv. 11. Section (d). If the dispute shall not be settled and the Local Union shall desire assistance or strike benefits from the International Union, the General President shall be informed of all the facts thereof; and, if in his opinion the grievance is a just one, he may give his sanction and give the support of the

International Union to the action contemplated or already entered into by the Local Union, its Committee, Local Executive Board or Business Representative. If, under any circumstances, the General President shall be represented by a deputy in the investigation of a dispute or a contemplated action or an action that has already been entered into on the part of a Local Union, its Local Executive Board, its Committees or its Business Representative, the deputy shall report in detail to the General President and the General President can through a deputy convey such sanction and support required as though present in person.

Contracts

Art. XXIV. Subdiv. 11. Section (e). Proposed collective bargaining agreements and modifications thereof may be negotiated for Local Unions by the Business Manager, by a committee, by the Local Executive Board, or by

the Business Representative. Such agreements and modifications thereof shall not be executed until they have been presented at the next membership meeting following the negotiation of the proposed agreement and have been approved by the membership affected, provided, however, that a Local Union may delegate to its Local Executive Board or to its bargaining committee authority to approve such agreements and modifications without such submission of the same to vote of its membership.

When such approval has been obtained, the agreement shall be signed bv the Local Union's President, Recording-Corresponding Secretary, and Business Manager where the Local Union has such a position. Copies of final agreements and modifications thereof negotiated by Local Unions shall be filed with the General President immediately after execution.

OMISSIONS

MR. STEINER: May it please Your Honor? I have a stipulation that I would -

THE COURT: Ladies and gentlemen, you will recall my instructions at the beginning of the case that the evidence in this case would consist of the testimony of witnesses and documents and possibly other things received into the record as well as any stipulations or agreements that the parties enter into.

And you're about to hear a stipulation, that's an agreement as to certain facts. This is evidence, you can take these facts as proven, and it's evidence and it's evidence for your consideration.

All right, Mr. Steiner, if you will read the stipulation, please.

MR. STEINER: My it please Your Honor and members of the jury? These stipulations have been numbered.

One, Stauffer Chemical Company, division of Rhone-Poulenc, Inc., successor to Stauffer Chemical Company, under the 1985 Collective Bargaining Agreement for the furnace plant and operated under the 1988 Collective Bargaining Agreement, from December 2nd, 1987, until October 13, 1988.

Then we skip over a number.

Number three, no plaintiff has previously transferred between the plants or refused to transfer after layoff under the memorandum agreement of September 13, 1982.

Rhone-Poulenc laid off the following plaintiffs in July of 1991:

Rickey Patrick, Michael Lindsey, Ricky Farmer.

Rhone-Poulenc laid off the following plaintiffs after July of 1991:

Gene Barker, Ray Bassham, Russell Bishop, Thomas Bishop, Tony Brock, Dennis Butler, Waylon Carroll, Hazel Chapman, William

Claude, W. T. Colvert, Mike Fazekas, Robert Gilliam, Danny Green, Michael Harlow, Jerry Hicks, Walter Hudspeth, Mark Hunt, Gerald Isabell, Nadine James, Richard W. James, William Jarratt, Terry Jennings, Bobby Kelly, Milton Knowles, Rickey Lindsey, Jimmy Lott, Roland McKnight, Raymond Neely, Terrance Nevette, David Osborn, David Paley, Michael Pilkinton, James Riddle, Charles Robinson, Andrew L. Scott, James R. Scott, Jr., Joseph Shyes, Sharon Liles Steiner, Terry Thomason, Robert Tidwell, Joy Ward, Michael Whitwell, Geneva Higgins.

And the following plaintiffs are still employed by Rhone-Poulenc:

Sammy Boshers, Charles Polk. Marvin Henson. Joe Blair, James Frierson, Wayne Frierson, Edward Rogers, Guerry Cole, Charles Frierson, Bob Gray, Lois Brown, Albert Akins, Gary Riley, Charles Wright, Lonnie Bradburn, Douglas Lindsey, Alfonzia Akins, David

Workman, Gregory Claude, George Parsons, Willie Roy Thompson.

The plaintiff Leland Webster recently retired from Rhone-Poulenc.

That's the end of the stipulation, Your Honor.

THE COURT: All right.

MR. STEINER: Submit this.

THE COURT: That was one, three and four?

MR. STEINER: One, three, four, five, six and seven, Your Honor.

THE COURT: All right.

MR. OZIER: Mr. Steiner, do you have copies of that for us?

MR. STEINER: I had furnished you all copies previously.

THE COURT: Are these the stipulations that were filed?

MR. STEINER: It's signed by everyone.

THE COURT: Were these the ones that were filed?

MR. STEINER: No, Your Honor. No. These are the ones at the beginning of the trial. I gave -- but I think I have another copy, but I gave each one a copy when I submitted the original to you.

MR. OZIER: We would like a signed copy.

THE COURT: Miss Suzanne, make copies of these so that everybody will have a copy in hand.

MR. STEINER: Call David Paley, Your Honor.

and you sat there and didn't say a word, and by all rights I ought to make you just stay here. And you~re not going to be excused in the future.

MR. STEGALL: I hope I won't.

THE COURT: Keep your ears open and pay attention. But you're going to do your duty. You're excused and discharged, you can go.

MR. STEGALL: Thank you.

THE COURT: All right. Now on the question of Stauffer Chemical Company, as I understand it, as I posed the question in chambers, there is no dispute but that the detailing of the various corporate transactions set forth in the opinion of the Superior Court of Delaware is accurate?

MR. STEINER: Yes, Your Honor, as supplemented.

MR. OZIER: Your Honor, we think those facts are accurate.

THE COURT: As I understand it, there is no question but that Rhone-Poulenc and Rhone-Poulenc Basic Chemicals, the corporate defendants in this case, agree and expressly state and so represent to the court, on the record, that these defendants assumed the 1985 Collective Bargaining Agreement that had incorporated in it as a part of the Collective Bargaining Agreement the side agreement that is sometimes referred to as the October 13, 1982, agreement.

Is that correct, Mr. Ozier?

MR. OZIER: Yes, sir. September 13.

THE COURT: September 13?

MR. OZIER: That's correct, Your Honor.

THE COURT: And that if liability arises out of it, although it was first negotiated when Stauffer was in the saddle, it would be the liability of these corporate

defendants present before the court, is that correct?

MR. OZIER: That's correct, Your Honor. Any liability under the 1985 or the 1988 Collective Bargaining Agreement is our liability, Rhone-Poulenc, Inc. and Rhone-Poulenc Basic Chemicals Co.

MR. STEINER: Or 1991.

MR. OZIER: Or 1991.

THE COURT: All right. And based upon that representation, you agree that we can sweep Stauffer out of the way?

MR. STEINER: Yes, Your Honor.

THE COURT All right. The action will stand dismissed as to Stauffer. I think it's abundantly clear Stauffer simply doesn't exist. Stauffer is given the -despite all the bumbling in the corporate papers -- the various corporate transactions come out, the bottom line, that its existence is ended as a result of these various mergers. But after the

representation on the record, it's agreed that Stauffer be dismissed as a party defendant.

...

THE COURT: Well, I think we can put aside, I'll ask this in a way to see if we can crystallize these issues. You don't insist that this is an instance where there was a sufficient allegation that the president was in some fashion obligated to exercise his powers to place the local in trusteeship, do you?

MR. STEINER: No, Your Honor.

THE COURT: That's to address financial irregularities and gross misconduct and only in an emergency can he do it without a hearing. Now if we can disregard that portion --

MR. STEINER: Yes, Your Honor.

THE COURT: Okay.

MR. BARRETT: Thank you, Your Honor. Appreciate counsel's candor.

THE COURT: That arose in part of Mr. Hanley's affidavit that he goes into those

Canadian cases and also the case of a start-up local where he keeps it under international supervision to get a fledgling local started, and also those three or four New Brunswick, Quebec, and those Canadian cases where the finances were in disarray, the business manager of one local had been convicted of embezzlement, all that is not applicable to this situation.

...

MR. STEINER: Oh, yes. Mr. Nevette's letter came in, he knew about Mr. Nevette's letter and exactly what he was saying.

But then he got Mr. Kincade's letter, and not only like the additional letter where he knew that the local union was telling these people, Your rights will not be affected, don't worry about it, don't do anything. He knew that from the letters. And he did nothing.

And then when he got the second letter, he knew from Mr. Kincade that the grievance was not going to be pursued and he knew that it wasn't going to be pursued because it would affect the ICI group of employees. And he knew fully of the conflict of interest involved and he favored the surviving company.

And I believe that such arbitrariness on a union constitution, where they say the president is strictly accountable -- they don't say strictly accountable. Let me just read the exact words, Your Honor.

He shall --

THE COURT: What page?

MR. STEINER: This is page 24. Top of the page, second line down.

THE COURT: Yes.

MR. STEINER: H shall be strictly accountable and responsible for the faithful performance of his duties and shall -- doesn't

use any other term -- shall administer and enforce every law, rule, regulation and requirement of the constitution, Ritual and Obligation.

Those are clear words, they told these plaintiffs.

...

MR. STEINER: But they gave him authority for unlimited discretion, but ahead of that they said he shall be strictly --

THE COURT: No.

MR. STEINER: Strictly accountable

THE COURT: Peculiarly enough they make him accountable first and then diminish it.

MR. STEINER: Well, Your Honor, these terms are supposed to be construed consistently.

THE COURT: I agreed.

...

MR. STEINER: The admission to membership in conformity to the Constitution, Obligation and Ritual constitutes a contract between the member, his local union, the international union and every other member therein.

THE COURT: I don't believe you're getting a single dissent over there. You wouldn't even be here. You would have gone on motion for summary judgment if you didn't have a colorable contract claim. I mean the only basis you have survived, your clients have survived the motion is because they stand in a contractual relationship.

MR. STEINER: Well, if it is a contract, there must be provisions that it can be enforceable and not just subject to some arbitrary unlimited discretion. When they said unlimited discretion, you have to look at the other terms of the contract that mean things.

THE COURT: Now you want me to strike the constitution down?

MR. STEINER: No. If it is a contract, there are contractual provisions in it.

...

MR. STEINER: It's a more tortuous matter than it is a contract matter when you get into these type situations when you're talking about a contract, when people pay dues every month and say we want certain --

THE COURT: Well, they pay dues over here too.

MR. STEINER: Pardon me?

THE COURT: I say they paid dues in Brenner too.

MR. STEINER: I'm telling you, not on the protection, when you pay dues for someone to keep your books for you, or do a normal contract matter, you have duties that you expect under normal contract matters. You

don't pay dues generally to be protected from tortuous assaults. But for the actual functioning of the international union, carrying on the union business, this is essential, this was an absolute part of making the union function the way that it should. Performing the very duties that the constitution spelled out. These were contractual matters and the international president, the international union says, You join our union and these are the services we will give you, and they did not give them those services.

THE COURT: All right. I think I have got it. Something else you want to say?

MR. STEINER: No. Your Honor.

...

MR. STEINER: May it please Your Honor? The reason that was offered was strictly for the provision assuring the performance of the collective bargaining

agreements or other duties of a bargaining representative. I was going to have him -- or he was going to testify that no, this was not a case of international supervision, but that the general president was vested with the power -- this is where the power is stated -- and it's a range of power. It says he shall have the power to suspend or remove such local officers. That's one thing. The full power, this is defining his extent of power. Or he shall have the power to suspend or revoke charters of such local unions. That's another part. And then the final is or place such local unions and their officers and members under international supervision. That's the extreme limit.

But this shows that he had the full power to correct this with the local officials and is --

THE COURT: But how do you correct it? You can't read it in isolation, one

sentence. How does he exercise his power? He exercises it by this extraordinary powder to intervene in the affairs of the local.

MR. STEINER: I don't think that is what it says. Your Honor. He has the full power to go as far as suspending a union official or removing. He has the full power to do that. He has power all the way up to that. That indicates he has power to do anything. You can call him on the phone, he has supervisory power over them. But the international -- the placing them under international supervision is the third thing. That's the extreme of his limit. It says or as a final power place such local unions under international supervision. That's the extent of his power.

The other two provisions are saying he has the power to do two things; has full power to suspend or remove the officials or suspend or revoke charters or place them under

supervision. That's a range of powers. And that's the reason this was being put in, just to show the range of his power. And the first thing he was going to say is that, no, this is not an international supervision situation. That's the limit of his powers. All we're stating is this is the type powers the president has. It can go all the way up to that.

But in this case all we're talking about is all he had to do was call and use a telephone. But this shows that the president had power to take corrective action in regard to that agreement assuring the performance of collective bargaining agreements or other duties of a bargaining representative.

And I believe that -- certainly think that the jury should, since it is a full sentence like Your Honor said, that the full sentence of his power, the thing should be

read and then state this is the provisions applicable to this case.

THE COURT: What provision?

MR. STEINER: The provisions that for the purpose of assuring the performance of collective bargaining agreements or other duties of a bargaining representative he shall have full power to suspend or remove such local officers, suspend or revoke charters. That power --

THE COURT: But that power is not at issue in this case because you conceded it. That this isn't a case to suspend or remove officers or to suspend or revoke charters.

MR. STEINER: No, Your Honor, but that shows the extent of his power. That shows he has power all the way up to do this. He has full power to do that. That includes power of supervision.

This is the key clause that we rely on, this is assuring the performance, and this

is what are the duties of a bargaining representative. This is the very clause that Your Honor said in the memorandum opinion was violated.

THE COURT: But you on your feet last night conceded that under the facts of the case now that we're in trial and explored it that is not to be invoked.

MR. STEINER: Oh, I didn't understand it that way, Your Honor. I understood that we're not asking international supervision. This is not an international supervision case. ...

...

... And it's unnecessary in view of the fact that there was a clear statement on the record last night during the legal arguments on those motions that this simply wasn't a case where -- because I put that to you, I said, Mr. Steiner, are you making any insistence that this is a case where the intervention of the

general president under his powers to place this union in a trusteeship is involved? And you said, No, Judge, it isn't.

And then Mr. Barrett was getting ready to launch into that as part of his argument, and he turned to you, or he said to the court that he very much appreciated the concession or the lawyerlike concession on the part of Mr. Steiner. Those were almost his verbatim words.

I said, Mr. Barrett, you don't even need to go into that part because it's not an issue in this case. Mr. Steiner has removed it.

...

MR. STEINER: He has full power to suspend or remove local officers, suspend or revoke charters of such local unions, or place such local unions and their officers and members under international supervision -- which is a lawyer word or another way of

saying trusteeship. That's the extreme power he had.

And the other is the full power to do this, if he has full power to do this, he has full power to control this situation here when he would call them on the phone, which is probably the only remedy required here, that he had to do and say, Do this, or, Render this opinion. That shows the range of his power, and that was the only purpose that it was offered and it clearly indicates a range by using the word or, this final thing they list here --

THE COURT: Well, the sanctions are all raised in the disjunctive. It starts out after he shall have full powers to suspend or -- the first disjunctive -- remove, and then comma, suspend, that's officers disjunctive or revoke charters.

MR. STEINER: That is suspend or revoke applies to charters and the other suspend or remove applies to local officers.

THE COURT: That's right.

MR. STEINER: Then there is a final one that says which is the extreme power, or place them under international supervision.

THE COURT: And you don't suggest that this is a case to suspend or remove local officers.

MR. STEINER: No, I said it just has the full power to do that. That shows the power of the president to remedy this particular defect. If he has that power, that, the full power, that covers power all the way down for him being able to call them on the phone. That's the type power he has.

But the extreme power is placing it under a trusteeship, and there is no indication of that, that that's the requirement or what would be even asked here.

In fact, specifically the witness was going to say, that's not what should have been done here, or we're asking to be done here.

All we are asking was that the president act with these full powers that he had. Not that extreme power, which is the final extreme thing set as the third power to place under international trusteeship, and no intention of that ever be done.

IN THE UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

ALBERT AKINS, et al.,	)	
	)	
Plaintiffs - Appellants,	)	
	)	
TONY BROCK, et al.,	)	
	)	
Plaintiffs,	)	
	)	
v.	)	NO. 94-5132
	)	
ZENECA, INC.,; RHONE-POULENC, INC.; RHONE-POULENC BASIC CHEMICALS COMPANY; STAUFFER CHEMICAL COMPANY; INTERNATIONAL UNION OF OPERATING ENGINEERS, AFL-CIO; LOCAL 912 INTERNATIONAL UNION OF OPERATING ENGINEERS, AFL-CIO,	)	
	)	
Defendants - Appellees.	)	

APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF TENNESSEE -
COLUMBIA DIVISION

BRIEF FOR APPELLANTS

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(615) 244-5063

Attorney for Appellants

OMISSIONS

ISSUES PRESENTED FOR REVIEW

1. Whether Plaintiffs' rights to transfer to the organic plant under the Cross-Bumping Agreement of 9/13/82 were vested and binding on the Defendant, ICI.[1]

2. Whether the Trial Court erred as a matter of law in entering summary judgment for the Defendant, ICI.

3. Whether the Defendant, Rhone-Poulenc carried its burden of proof to show that the impossibility doctrine was applicable and that performance of its contractual obligations under the Cross-Bumping Agreement was in fact impossible.

4. Whether the Memorandum Agreement of October 13, 1988, changed the

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[1] For clarity, Zeneca, Inc. (formerly ICI Americas, Inc.) is referred to as ICI; Rhone-Poulenc, Inc. and Rhone-Poulenc Basic Chemicals Co. as Rhone-Poulenc; International Union of Operating Engineers, AFL-CIO as International Union; and Local 912 International Union of Operating Engineers, AFL-CIO as Local 912.

obligations of Rhone-Poulenc to Plaintiffs under the Cross-Bumping Agreement?

5. Whether the Memorandum Agreement of October 13, 1988, was ambiguous, creating an issue for the jury?

6. Whether it was error to enter judgment for Rhone-Poulenc under Rule 50 of the Federal Rules of Civil Procedure as a matter of law.

7. Whether waivers, as provided for in the Memorandum Agreement of April 19, 1991, signed by certain Plaintiffs in exchange for severance pay, also released the claims against Rhone-Poulenc involved in this matter.

8. Whether the Memorandum Agreement of April 19, 1991, providing for severance pay, was ambiguous, creating a jury issue as to the effect of a waiver of certain claims against Rhone-Poulenc.

9. Whether Local 912 had a conflict of interest between bargaining units

and favored the other unit over Plaintiffs' unit.

10. Whether Local 912 breached contractual obligations to Plaintiffs under the Union Constitution by not permitting Plaintiffs to participate in the negotiations of the 1991 ICI contract nor submitting that contract to Plaintiffs for approval.

11. Whether Local 912 breached its duty of fair representation to Plaintiffs.

12. Whether the International Union was a participant and fully bound and responsible for the actions of Local 912.

13. Whether the International Union had a conflict of interest between bargaining units and favored the other unit over Plaintiffs.

14. Whether the International Union had a duty of fair representation to Plaintiffs.

15. Whether the International Union breached contractual obligations to Plaintiffs under the Union Constitution by permitting Local 912 to enter the 1991 ICI contract without Plaintiffs' participation, and by permitting Local 912 to refuse to pursue grievances for Plaintiffs and by failing to act as requested.

16. Whether Defendants conspired against the Plaintiffs, including induced breaches of trust and contract.

STATEMENT OF THE CASE

Plaintiffs sued Defendants alleging that under a written Memorandum Agreement of September 13, 1982, known as the "Cross-Bumping Agreement", they were entitled to transfer to the organic plant if they were laid off from the furnace plant. Plaintiffs further alleged that Defendants engaged in a conspiracy against Plaintiffs and that when they were laid off in 1991, Defendants refused

to furnish them the transfer rights granted them under the Cross-Bumping Agreement. (R. 1.)

Defendants filed motions to dismiss and for summary judgment. On August 27, 1993, the Court granted summary judgment, completely dismissing the claims against ICI; dismissing the claims against Rhone-Poulenc of the Plaintiffs who had signed waivers in exchange for severance pay; dismissing the conspiracy claims, including breaches of trust and contract; and further holding that the International Union had no duty of fair representation to Plaintiffs and the International Union was not responsible for the actions of Local 912. The Court held the Cross-Bumping Agreement clearly provided transfer rights to Plaintiffs, that the Memorandum Agreement of 10/13/88 was ambiguous and denied summary judgment for the Rhone-Poulenc Defendants. The Court further denied

summary judgment to Local 912 on the claims involving duty of fair representation and breaches of the Union Constitution. The Court also denied summary judgment to the International Union on the claims involving breaches of the Union Constitution. (R. 171, memorandum of the Court.)

Thereafter, a trial was held from October 18, 1993, to October 21, 1993. On October 19, 1993, the Court dismissed Stauffer Chemical Company as a Defendant based on the representations of Rhone-Poulenc that it was responsible for any liability of Stauffer Chemical Company. (TR. 248, 249.) On October 21, 1993, at the conclusion of Plaintiffs' proof, the Court granted Defendants' motions under Rule 50 for judgment as a matter of law. (R. 250; Bench ruling, TR. 725-749.) On October 22, 1993, a final judgment was entered dismissing the action with prejudice and terminating the case. (R. 251.)

On October 28, 1993, Plaintiffs filed a motion for new trial (R. 257), which was denied on December 30, 1993. (R. 262.) On January 28, 1994, forty (40) of the Plaintiffs filed a notice of appeal. (R. 263.)

STATEMENT OF FACTS

Plaintiffs were employed for many years by Stauffer Chemical Company at two plants in Maury County, Tennessee. Plaintiffs were members of Local 912 and as a condition of membership, automatically became part of the International Union. Their Union dues were split between Local 912 and the International Union. (R. 162, ¶ 11; TR. 322, 323, 342, 368; Ex. P-7.)[2]

Prior to 1982, there was a single collective bargaining contract governing both plants. Employees, including Plaintiffs,

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[2]Exhibits are listed as filed on motions. In the appendix designation, the trial number, if applicable for the same exhibit, is listed in parenthesis.

frequently switched from plant to plant. One plant manufactured phosphorus and was known as the "furnace plant". The other manufactured pesticides and was known as the "organic plant". (R. 171, memorandum of the Court, 2; TR. 322, 325, 335, 371, 438, 439, 443, 561, 562; Ex. P-7.)

In 1982, Stauffer Chemical Company insisted that the two plants be under separate Collective Bargaining Agreements. The employees wanted to retain separate contracts but in any event, they wanted to retain all of their transfer rights between the two plants. The employees finally agreed to separate contracts on condition that employees who had seniority to transfer between the two plants as of that date should retain a one time transfer right to the other plant. Because of the importance of the issue, Local 912 requested the assistance and participation of the International Union. A separate written

agreement referred to as the "Memorandum Agreement of September 13, 1982", was entered into to promise Plaintiffs and other qualifying employees a one time right to transfer to the other plant in the event of layoff at the other plant. This agreement was commonly referred to as the "Cross-Bumping Agreement". (R. 171, memorandum of the Court, 2, 3; TR. 333, 336; Ex. P-7, Ex. P-52, Ex. P-55.)

At the same time, separate Collective Bargaining Agreements were executed for the two plants. The 1982 Collective Bargaining Agreement for the furnace plant was executed on behalf of the furnace plant and by the negotiating committee for the furnace plant. The 1982 Collective Bargaining Agreement for the organic plant was executed by the organic plant and by the negotiating committee for the organic plant. The separate 1982 Collective Bargaining Agreements for the

two plants both listed the Cross-Bumping Agreement as being included by reference. The Cross-Bumping Agreement was signed separately by the employer on behalf of the furnace plant and organic plant. The negotiating committees for both plants signed the Cross-Bumping Agreement on behalf of their respective bargaining units. (R. 171, memorandum of the Court, 4; TR. 331, 337; Ex. P-26, Ex. P-27, Ex. P-28.)

The Cross-Bumping Agreement provides in full as follows:

> Local Union No. 912, International Union of Operating Engineers and Stauffer Chemical Company for its Phosphorus Products Plant (Furnace) and its Intermediate Agricultural Chemicals Plant (Organic), both located at Mt. Pleasant, Tennessee do hereby agree that:
>
> 1. Employees hired prior to September 11, 1982 may exercise layoff rights as described below with the exception of current

furnace plant employees who do not have the seniority to displace current employees at the organic plant.

2. Employees shall first exhaust their rights under the layoff procedures described in the collective bargaining agreement covering the plant to which they are assigned.

3. Employees of either plant covered by this Memorandum of Agreement who are to be laid off from their plant may then displace junior employees in the other plant provided that:

a. the employee displaced shall be the junior employee in the classification.

b. The employee must qualify for such classification after a reasonable training period at the organic plant or a period of fifteen (15) working days or less at the furnace plant. If the employee fails to qualify, he will not be

allowed to make further choices of jobs but rather will be laid off.

4. Employees who elect to move from one plant to another will become an employee of the plant to which they have moved and will have no further rights to return to the other plant.

5. Employees who are given the opportunity to exercise their rights under this Memorandum of Agreement and who decline to do so shall forfeit future rights under this Agreement. (Ex. P-28.)

Local 912 represented both bargaining units in the 1982 negotiations. Local 912 continued to represent both bargaining units after the execution of the Cross-Bumping Agreement establishing conflicting interests between the two bargaining units. Prior to 1991, employees at the organic plant had exercised transfer

rights to the furnace plant under the Cross-Bumping Agreement. (TR. 573; Ex. P-7.)

The International Union, at the request of Local 912, participated in the 1982 negotiations and in the subsequent negotiations in 1985 and 1988 for both plants. During the 1985 negotiations, Stauffer Chemical Company attempted to terminate the Cross-Bumping Agreement. However, both bargaining units refused and the Cross-Bumping Agreement was listed and incorporated by reference into the separate 1985 Collective Bargaining Agreements for the organic plant and the furnace plant. (TR. 337-339; Ex. P-53, Ex. P-54, Ex. P-55.)

In 1987, ICI purchased both plants and operated them under the 1985 Collective Bargaining Agreements. Later in 1987, ICI sold the furnace plant to Rhone-Poulenc but retained the organic plant and continued to operate it under the 1985 Collective

Bargaining Agreement executed by Stauffer Chemical Company. (R. 162, ¶¶ 35-40, 102; TR. 340.)

In the 1988 negotiations for the organic plant, ICI also attempted to terminate the Cross-Bumping Agreement. However, the bargaining unit for the organic plant refused and the parties agreed on the 1988 ICI Collective Bargaining Agreement which expressly listed and incorporated by reference the Cross-Bumping Agreement. (R. 162, ¶¶ 55, 56; Ex. P-7.)

Rhone-Poulenc, after purchasing the furnace plant, operated under the 1985 Stauffer Chemical Company Collective Bargaining Agreement from December 2, 1987, until October 13, 1988, and was a successor to Stauffer Chemical Company under that Collective Bargaining Agreement. (R. 162, ¶ 102; TR. 524.) Rhone-Poulenc, in an internal memorandum dated 9/13/88, by its chief

negotiator, G.L. Suydam, analyzed the Cross-Bumping Agreement in preparation for the 1988 negotiations. (TR. 562; Ex. P-4.) The memorandum of 9/13/88 provided in pertinent part as follows:

> I reviewed the cross bumping agreement with Bob Stringer, Personnel Manager at the ICI plant. He was very helpful and knowledgeable.
>
> ...
>
> - The affected employees are more numerous than I imagined. Bob prepared the list attached 10/9/87. It is a combined seniority list of the two plants which showed 154 furnace plant employees and 117 organic plant employees as potentially having the seniority described in the agreement. On today's Furnace Plant Seniority list there remain 135 employees with the seniority described in the agreement.
>
> - I have tried to analyze four positions relative to this problem.

1. Do nothing -- This position relies on the two principles that neither company considers the cross bumping agreement as enforceable and if contested the resolution of the problem will be smaller in the future than it will be today. As we have discussed, the liability, if any, rests with the Company that lays off and cannot force the remedy of the Agreement on the opposite Company. Therefore, our worst case scenario would be a plant closure. In that scenario we would have to give the newly legislated 60-day notice, negotiate terms for closing and also negotiate resolution to the cross bumping agreement. In that we would not be able to provide the jobs it calls for, a monetary solution would

likely result either through negotiation, arbitration or litigation.

2. Negotiate the Agreement out -- If the cross bumping agreement represents a significant liability to the Company it then must also represent a significant asset to the employees. We must be resolved to make a monetary offer or severance arrangement to compensate this difference if negotiations are to be successful.

3. Negotiate and fail - pre strike -- If the Company raises the issue and capitulates as ICI did in January, we will have reduced our future argument that the agreement cannot be enforced. ICI verbally disclaimed their acquiescence but

nevertheless signed the existing agreement.[3]

Thereafter during the 1988 negotiations, Rhone-Poulenc submitted the following Proposal A to the bargaining unit which was rejected:

> The Memorandum of Agreement dated 9/13/82 and referenced in the ARTICLE XVI, SECTION II of the Agreement is amended with this Memorandum of Agreement.
>
> Anyone who is not an employee of the Stauffer Chemical Company, Division of Rhone-Poulenc, Inc., Mt. Pleasant, Tennessee, Furnace Plant, as defined in ARTICLE I, SECTION I will not be allowed to displace or exercise seniority over employees of the Company. (TR. 562-564; Ex. P-1, Ex. P-2.)

Rhone-Poulenc then submitted the following Proposal B which was also rejected by the negotiating committee:

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[3]Underlining supplied.

> This Memorandum of Agreement dated 9/13/82 and referenced in the Collective Bargaining Agreement was discussed and affirmed in open negotiations.
>
> Employees of ICI Americas Mt. Pleasant Plant who possess the seniority described in the 9/13/82 Memorandum of Agreement may exercise such seniority in the Mt. Pleasant Furnace Plant by displacing employees of the Company when they become eligible under that Memorandum.
>
> Employees of the Mt. Pleasant Furnace Plant who seek to exercise their seniority in ICI Americas's Mt. Pleasant Plant rely solely on the commitment of ICI Americas to this 9/13/82 Memorandum of Agreement. The Parties understand that Stauffer Chemical Company, Division of Rhone-Poulenc will not be responsible for its former employees in these efforts nor will there be any other remedy by Stauffer/Rhone-Poulenc. (TR. 564, 565; Ex. P-1, Ex. P-3.)

Rhone-Poulenc then took the position that if the negotiating committee for the bargaining unit would not amend the Cross-

Bumping Agreement, it must affirm the agreement. Mr. Suydam stated the reason for such an affirmance was so the employees would know that the negotiating committee had refused to amend the Cross-Bumping Agreement if employees from the organic plant replaced them by transferring under the Cross-Bumping Agreement. (TR. 566, 567; Ex. P-1, Ex. P-29.)

The parties then entered into the following agreement dated October 13, 1988, for the purpose of affirming the Cross-Bumping Agreement:

> The Company will have fulfilled all obligations under the Collective Bargaining Agreement when its employees have been layed [sic] off under Article VIII, Seniority, or when its employees have been layed [sic] off under the terms of the 9/13/82 Memorandum of Agreement as it pertains to I.C.I. (Organic Plant). (TR. 567, 568; Ex. P-14.)

The final 1988 Collective Bargaining Agreement for the furnace plant

expressly incorporated by reference the Cross-Bumping Agreement without change. The succeeding 1991 contract for the furnace plant again expressly incorporated the Cross-Bumping Agreement by reference and Rhone-Poulenc is operating under the 1991 contract today. (TR. 343-367, 381, 626, 627.)

It was the position of Local 912 during the 1988 negotiations that one bargaining unit could not affect the rights of the other bargaining unit. Local 912 had taken this same position since 1982 and continued to so advise the employees of both bargaining units after 1988. ICI always took the position that it was never at any time bound by the Cross-Bumping Agreement even though it had signed the 1988 contract for the organic plant expressly incorporating the Cross-Bumping Agreement. (TR. 346, 347, 350, 351, 443, 444, 570-573; Ex. P-7, Ex. P-14, Ex. P-17 at 37, 109, 122, 134-144, Ex. P-18 at

102-105, 116, 120, 132, 145, 149, 202, Ex. P-19 at 53, 54, 60-63, 69,85, 86, 100, 101.)

On June 20, 1990, Rhone-Poulenc announced the planned closing of the furnace plant with layoffs to begin in February of 1991. At the same time, Rhone-Poulenc issued a planning calendar providing in part as follows:

6-20-90	Coordinated announcements to employees at Globe and Furnace Plants of curtailment of production and timetables. Press releases made to local media.
...	
12-1-90	Announce manning table for February layoffs. A 60-day notice is required.
...	

2-1-91 Activate layoff, allow ten working days for bumping. (Ex. P-12, Ex. P-30.)

As a result of the announced closings, Local 912, in a letter dated June 26, 1990, to the International Union, requested guidance and an interpretation of the Union's Constitution. That letter of June 26, 1990, provided in part as follows:

> ...
>
> The work force for the Organic Plant came out of the Furnace Plant's work force and was, therefore, under the same contract as was the Furnace Plant with Local 912...
>
> The Furnace plant (elemental phosphorus) grew to a work force number of about 250. The Organic plant grew to about 125.
>
> ...
>
> In the negotiations in September of 1982 for a new contract, Stauffer took a firm position that it was going to separate the two plants, the Furnace and

Organic, and have a separate contract for each plant, since they were under two different divisions of the Company - the Chemicals Division at the Furnace plant (elemental phosphorus) and the Agricultural Division at the Organic Plant.

Since the Organic plant was staffed primarily from the Furnace plant, there was a major concern among each committee at each plant, about "bumping or rolling" between each plant in case of a reduction in force. The parties thus negotiated a "Memorandum of Agreement" and made it a part of each plant's contract, by reference, (See the included Memorandum) for those employees hired prior to September 11, 1982.

In June 1988, Local 912 negotiated a three-year contract with ICI Americas - the old Stauffer Organic plant. ICI tried to negotiate out the Memorandum of Agreement. The Union would not agree to let them. The company's final position was that the Company would not honor the Furnace Plant's employees bumping to the ICI (Organic) plant. The Memorandum of Agreement was left in ICI's Organic plant

Contract. The Union's position was that unless and until the Memorandum was negotiated out at both affected plants - the Furnace and Organic - the Agreement was still valid and, Organic (ICI) employees could bump to the Rhone-Poulenc's Furnace Plant when applicable.

When Local 912 negotiated the Furnace plant contract in 1988 with Rhone-Poulenc, the Furnace plant Management wanted to delete the Memorandum of Agreement. Again the Local was successful in keeping the right of the Furnace plant employees to bump to ICI's Organic plant.

...

The dilemma that Local 912 now has is that two separate entities, each with a contract with Local 912, has a contractual right to "bump" into the other plant as a last resort. The end result thus will be that those with enough seniority at Rhone-Poulenc's Furnace plant will by the Memorandum of Agreement bump or roll those less senior at ICI's Organic plant. ICI's employees will then be laid off.

The fact that this has created much controversy is an understatement. ICI's employees are very disgruntled and will probably try, encouraged by their Management, to negate and nullify the Memorandum of Agreement that permits Rhone-Poulenc's employees to bump them.

There is no question in my mind that either ICI's or Rhone-Poulenc's employees can, by following the proper procedure, negotiate away their Unit's right to go to the other plant. This was my position in the 1988 Negotiations at each Company. However, my position in the 1988 Negotiations was that neither Unit acting alone could negate or nullify the other Unit's right to exercise the bump or roll created by the Memorandum of Agreement negotiated in 1982, that this would have to be done jointly.

My questions to you for your interpretation of IUOE's Constitution under Article XXIV, Subdivision II, Section (e), page 105, is:

Can either ICI's employees or Rhone-Poulenc's employees, two separate entities under two separate contracts, now,

> acting alone, negotiate away the other entities rights under the Memorandum of Agreement dated September 13, 1982? If not, must there be a joint venture or negotiations to modify, negate or nullify the Memorandum, since the Membership affected includes both entities?
>
> ...
>
> From a logical standpoint, Rhone-Poulenc's employees, and 912's members, which is a larger Unit than ICI's, will not modify or relinquish its right to bump or roll ICI's employees, and in all probability will not even agree to a joint negotiations.
>
> On the other hand, ICI's employees, also 912's members under a separate contract and a much smaller unit, (125 versus 280) goaded by ICI's Management, will in all probability try everything possible to frustrate, circumvent, and/or prevent Rhone-Poulenc's employees from bumping them. (TR. 468-476; Ex. P-7.)

By letter of July 27, 1990, the International Union made the following

response to Local 912's letter of June 26, 1990:

> Reference is made to your June 26, 1990 letter to me concerning a memorandum of agreement contained in two collective bargaining agreements IUOE Local Union No. 912 has at separate plants, one owned by ICI Americas Inc. and the other owned by Rhone-Poulenc, Inc. The memorandum of agreement gives employees at each plant the right to bump or roll employees at the other plant under certain circumstances. Apparently, one of the plants is scheduled to be closed and questions have arisen about the rights of the employees under the terms of the memorandum of agreement. You requested by interpretation of Article XXIV, Subdivision 11, Section (e) of the International Constitution as to which employees should be allowed to vote on the resolution of these questions.
>
> Article XXIV, Subdivision 11, Section (e) provides, in pertinent part, that:
>
> > Proposed collective bargaining agreements and modifications

thereof may be negotiated for Local Unions by the Business Manager, by a committee, by the Local Executive Board, or by the Business Representative. Such agreements and modifications thereof shall not be executed until they have been presented at the next membership meeting following the negotiation of the proposed agreement and have been approved by the membership affected...

However, the situation described in your letter does not require an interpretation of this section of the Constitution. In your situation, the rights of the employees to bump and roll from one plant to the other are governed by the provisions of an existing memorandum of agreement. Since this memorandum of agreement is already in existence and has been in existence for some time, it is not a "proposed agreement or modification thereof" requiring additional

> membership approval now. Thus, there is no need to determine at this time what set of members constitute the "membership affected" that would be entitled to vote on a "proposed agreement or modification thereof." (TR. 477, 478; Ex. P-8.)

Local 912, through its business manager, James B. Kincade, conferred with its attorney, Dewey Branstetter, about its letter of June 26, 1990. Mr. Kincade also continued to seek advice and assistance from the International Union, including its legal staff. (Ex. P-10.)

On October 16, 1990, Local 912 filed a declaratory judgment action against ICI and Rhone-Poulenc requesting the Court to determine the validity of the Cross-Bumping Agreement and rights of the employees thereunder. By letters of that same date, October 16, 1990, Local 912 notified ICI and Rhone-Poulenc that as they had previously

discussed, Local 912 was filing a "friendly lawsuit". (Ex. P-34, Ex. P-35, Ex. P-36.)

The complaint in the declaratory judgment action alleged that the Cross-Bumping Agreement remained intact in the current ICI contract (¶ 8) and also remained intact in the Rhone-Poulenc contract (¶ 9). In its answer, ICI admitted the Cross-Bumping Agreement was referred to in its current contract but denied it became part of its contractual obligations. In its answer, Rhone-Poulenc admitted the allegations of ¶ 9 of the complaint. (Ex. P-36, Ex. P-37, Ex. P-38.)

On the same day the complaint was filed, Rhone-Poulenc, in a letter to ICI dated October 16, 1990, concerning availability of its employees, stated in part as follows:

> Due to economic reasons, our operation will be going through a "phase down" which will conclude, in early 1993, with the shutdown of the Mt. Pleasant Furnace Plant.

> Beginning in February, 1991, we will begin a series of layoffs to coincide with the various stages of production curtailment. (Ex. P-5.)

On November 19, 1990, Rhone-Poulenc issued a memorandum concerning availability of skilled employees which provided in part as follows:

> The Mt. Pleasant Phosphorus Plant in Tennessee is scheduled for curtailment and eventual shut down beginning with the reduction of approximately 140 employees in February, 1991. (Ex. P-33.)

The complaint in the declaratory judgment action further alleged that Rhone-Poulenc had "announced its intentions to close the furnace plant and began laying off employees in February, 1991". (¶¶ 10 and 11). Rhone-Poulenc admitted ¶ 10 but in response to ¶ 11, denied that it had "announced a specific date on which it plans to begin laying off employees from the furnace plant". This

allegation in the answer was the first indication given by Rhone-Poulenc that it might delay the layoffs. (R. 171, memorandum of the Court, 9; Ex. P-5, Ex. P-36, Ex. P-37, Ex. P-31, Ex. P-32, Ex. P-17 at 37, 41, Ex. P-18 at 130.)

In a letter dated December 12, 1990, ICI stated in part as follows:

...

> ...First, as I am sure the Union knows, the collective bargaining agreement expressly requires the Union to follow the grievance procedure and complete the arbitration process as to <u>all</u> disputes relating to interpretation of the contract...No grievance can be filed at this point because there is nothing to grieve. No layoffs have occurred and, as Rhone-Poulenc has now stated in its Answer, it has not even decided on any time frame for any layoffs to begin.
>
> Second, the lawsuit would be dismissed for the additional reason that the law regarding declaratory judgments requires that there

exist an actual "controversy" between the parties, and none exists here...Thus, the only controversy revealed by the complaint is one between the Rhone-Poulenc employees and the ICI employees, both of which groups the Union is supposed to represent. Unless and until the Union files in court a document claiming that the ICI employees (who the Union represents) should lose their jobs to laid off Rhone-Poulenc workers, there is no controversy between ICI and Local 912,[4] and the case must be dismissed. We believe there is a serious question as to whether the officers of Local 912 are really ready to state in writing that ICI's workers should be put on the street in order to make way for laid off employees with lesser skills who are employed by another company.

...Until the Union files a public document with the Court claiming that a refusal to throw ICI workers out of their jobs will violate the contract, the Court has no authority to hear the lawsuit. Of course, Local 912's representatives also would need to testify that

[4]Underlining supplied.

they believe the ICI employees should be forced to give up their jobs to employees from Rhone-Poulenc[5] if Rhone-Poulenc's plant closes.

...In this regard, please note that paragraph 11 of Rhone-Poulenc's Answer "denies that it has announced a specific date on which it plans to begin laying off employees from the Furnace Plant." Because the Union will be unable to show that the enforceability of the 1982 document will come into question prior to June, the case is not a proper declaratory judgment action and must be dismissed.

...

While negotiations obviously must result in elimination of any reference to the September 13, 1982 Memorandum of Agreement, as well as the other obsolete and unenforceable side agreements, ICI is prepared at the same time to negotiate a preferential hiring arrangement whereby laid off Rhone-Poulenc workers, meeting agreed qualifications, would be

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[5]Underlining supplied.

hired at the Organic Plant as the Specialties group creates new employment opportunities in the future.

To summarize, we believe that if Local 912 continues its lawsuit, the result will be as follows:

1. The lawsuit will be dismissed;

...

4. ICI employees will be angry with Local 912 representatives for pursuing an action designed to force them out of their jobs; and
5. Rhone-Poulenc employees will be angry with Local 912 representatives for giving up the chance to obtain preferential hiring rights with ICI.

...

In light of these factors, we recommend that your client seriously consider ICI's proposal. My instructions are to seek an early response and, absent meaningful progress toward agreement, to aggressively pursue dismissal of the

lawsuit. (Ex. P-6.) (Underlining supplied.)[6]

Local 912 did not inform the Plaintiffs or any member of the bargaining unit for the furnace plant of the above settlement offer. Thereafter, Rhone-Poulenc postponed the layoffs scheduled for the beginning of February, 1991, until the beginning of July, 1991.[7] No party to the declaratory judgment action filed a motion for summary judgment or motion to dismiss in that action. (R. 162, ¶¶ 63-67; R. 171, memorandum

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[6]This letter was produced by ICI Americas Inc. in response to discovery. Rule 408 of the Federal Rules of Evidence does not require exclusion of the document since it is not offered to prove liability of ICI Americas Inc. under the Cross-Bumping Agreement. It is offered for "another purpose" within the meaning of Rule 408; that is, on the issues of conspiracy, conflict of interest, breach of trust, tortuous interference with legal rights and bad faith of the Union. Friedus v. First National Bank, 928 F.2d 793, 794, 795; Bituminous Const., Inc. v. Rucker Enterprises, Inc., 816 F.2d 965, 968, 969 (4th Cir. 1987). Moreover, only the offeror is protected by Rule 408 and the protection does not extend to the offeree. Crues v. KFC Corp., 768 F.2d 230 (8th Cir. 1985).

[7]The first written document by Rhone-Poulenc stating the layoffs would be delayed, is the memorandum of March 7, 1991. (Ex. P-13.)

of the Court, 9; Ex. P-1, Ex. P-14, Ex. P-19 at 72-78, Ex. P-18 at 138, 150, 151, 184.)

Immediately after the announcement of the closing of the furnace plant, the organic plant employees were in favor of removing the Cross-Bumping Agreement from their Collective Bargaining Agreement to try to prevent furnace plant employees, including Plaintiffs, from displacing them. Local 912 talked the organic plant employees out of making a proposal to remove the Cross-Bumping Agreement by telling them they should let ICI make that proposal. (R. 162, ¶ 98; Ex. P-7, Ex. P-17 at 37, 121-124, Ex. P-18 at 118-121, 126.)

During the period after the announcement from June of 1990 through the execution of the new ICI contract on June 11, 1991, Local 912 continually represented to the employees of the furnace plant, including Plaintiffs, that they did not have to be

concerned about the ICI negotiations because the organic plant bargaining unit could not affect their rights. Thereafter, the organic plant bargaining unit agreed with ICI to delete the Cross-Bumping Agreement from the new 1991 ICI contract. (R. 162, ¶¶ 73, 74; TR. 346, 347, 350, 351, 443, 444, 570-573; Ex. P-14, Ex. P-17 at 107-109, 114-116, 160, 161, 167, Ex. P-40, Ex. P-41.)

No member from the bargaining unit at the furnace plant was permitted to participate in the negotiations relating to the organic plant. No member of the bargaining unit from the furnace plant ever agreed to or authorized the deletion of the September 13, 1982, agreement. The June, 1991 agreement between ICI Americas Inc. and Local Union No. 912 was never authorized or approved by, nor submitted to, the bargaining unit for the furnace plant. (Paragraph 17 of complaint

as admitted by answer of Local 912.) (R. 1, R. 23; TR. 352, 569, 571, 572.)

Shortly after the execution of the June 11, 1991, ICI contract, at the next Union meeting, Local 912 informed the Plaintiffs for the first time that their rights under the Cross-Bumping Agreement had been terminated by the agreement between ICI and the bargaining unit for the organic plant. If Plaintiffs had known earlier that their rights could be given up by the organic plant bargaining unit, they would have insisted on participation. They had the numerical strength, 250 to 125, to outvote the organic plant bargaining unit. (R. 162, ¶¶ 78, 79; TR. 353, 364, 370, 431, 447, 448, 571; Ex. P-9, Ex. P-10, Ex. P-17 at 37, 125-127, Ex. P-18 at 94, 95, Ex. P-19 at 15, 16, 18, Ex. P-40, Ex. P-41.)

Local 912 also informed Plaintiffs that on the advice of the Union's attorney, the declaratory judgment action was being

dropped. The Local Union refused to furnish Plaintiffs at that time a copy of the attorney's letter. One of the Plaintiffs, Terrance Nevette, called the attorney and requested information. The attorney refused to discuss the matter with him, stating that there was a conflict of interest because he represented the Local Union. Thereafter, layoffs began in the first week of July. (TR. 431, 432, 436, 448, 449, 450, 571; Ex. P-9, Ex. P-10.)

Immediately after the execution of the June 11, 1991, ICI contract, the parties to the declaratory judgment action dismissed that action by agreement. On June 11, 1991, the attorney for Local 912 had received a copy of the G.L. Suydam memorandum of 10/13/88 recognizing Rhone-Poulenc's potential liability if it laid off employees and could not force ICI to accept them. (R. 162, ¶¶ 79-81, 101; Ex. P-42.)

Plaintiffs duly presented grievances to both ICI and Rhone-Poulenc. Local 912 refused to participate in the grievance against ICI. Although advising Plaintiffs not to file a grievance, it did assist Plaintiffs in drafting a grievance against Rhone-Poulenc. ICI returned the grievance submitted by Plaintiffs to Local 912 stating that it had no contract with these employees. (R. 162, ¶¶ 82-84; TR. 353, 355, 362, 392-400, 437; Ex. P-9, Ex. P-10, Ex. P-43, Ex. P-45, Ex. P-47, Ex. P-62.)

Plaintiffs, through Waylon Carroll and Terrance Nevette, requested assistance from the General President of the International Union by letter of July 10, 1991. That letter provided in part as follows:

> We, the members of IUOE Local 912 are concerned about whether our interests were represented by our Union Representative, James Kincaid [sic]. We feel that we have

> been misled as well as misrepresented...We feel that Local 912 has a conflict of interest by representing both plants.
>
> ...
>
> We would appreciate anything you could do for us, as our union seems to be working against our best interest. There are many people who have worked at the plant 10-35 years, who will be left with nothing. We have enclosed our Second Stage Grievance against both ICI and Rhone-Poulenc. (TR. 363, 364, 444-447; Ex. P-9.)

By letter of July 16, 1991, Local 912, in a letter to the International Union, commented on Plaintiffs' letter of July 10, 1991, in pertinent part as follows:

> ...
>
> In substance the disgruntled members have three complaints: One, the roll or bumping issue and the alleged conflict of interest by Local 912, IUOE, representing both plants in the controversy; two, the Union's refusal to give a copy of its attorney's letter withdrawing its "Declaratory Judgment Suit"

to one or more of the disgruntled members; and, three, the opening of Rhone-Poulenc's (the old Stauffer Furnace Plant) contract with Local Union 912, which expires 15 August 1991.

As to the first complaint, on June 26, 1990, I, James B. Kincade, wrote you a letter (copy enclosed, numbered Document #1) explaining the dilemma that Local 912 faced requesting your interpretation and counsel in the matter. On 27 July 1990 you responded by letter, a copy of which is attached to my June 26 letter. In addition, I have talked with Richard Griffin and Helen Morgan in IUOE's legal department as to the general problem involved.

After talking with Dewey Branstetter, Jr. of the Nashville law firm of Branstetter, Kilgore, Stranch and Jennings, it was decided that the proper route to go was with a declaratory judgment lawsuit...

...

Although I recommended the members not go the grievance route in the controversy, because of the obstacles apparent, I drafted the

> written grievance for them, requesting they wait until the lay-off occurred before grieving. (The grievance was attached to Nevette's and Carroll's letter faxed to you dated 10 July 1991.)
>
> The problems with the grievance route are many and gets back into the legal arena. One question is obvious. Suppose Rhone-Poulenc grants the grievance! How can Local 912 make ICI take the employees from Rhone-Poulenc. <u>If Local 912 goes to court in an effort to do so, where does that leave Local 912 with its members at ICI as to fair and proper representation? This is one of the dilemmas I discussed with Branstetter, our attorney. This is one of the reasons he recommended against the grievance route</u>.[8]...I have sought guidance from your office and IUOE's legal department as well as Local 912's Attorneys. (TR. 367, 458-467; Ex. P-10.)

By letter of August 5, 1991, the International Union responded as follows to Plaintiffs' letter of July 10, 1991:

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[8]Underlining supplied.

> After reviewing this matter, I have determined that the referenced agreements were entered into by the Local Union as exclusive bargaining representative for the respective bargaining units, and that the International Union is not a party to those agreements. Accordingly, the International Union is without authority to alter or amend the terms of those agreements nor intervene in the subject matter of your letter. Be further advised, however, that it appears that Local Union No. 912 has acted vigorously and in good faith in this matter to protect the interests of all members covered by the applicable collective bargaining agreements. (TR. 364, 365, 368, 451, 452; Ex. P-44.)

Thereafter, a large number of Plaintiffs were laid off in September of 1991. On September 27, 1991, Plaintiffs resubmitted the grievance to Rhone-Poulenc. Plaintiffs attempted to resubmit the grievance to ICI but it was refused. (TR. 392, 393, 396, 355, 437; Ex. P-62.)

On September 27, 1991, Local 912 unilaterally without Plaintiffs' participation discontinued the grievance against Rhone-Poulenc and notified Waylon Carroll, one of the Plaintiffs laid off effective September 27, 1991, that Local 912 would take no further action. Thereafter, Plaintiffs duly filed this suit. (R. 162, ¶ 106; TR. 362, 363, 427-432; Ex. P-48, Ex. P-60, Ex. P-62.)

After their layoffs, certain Plaintiffs accepted severance pay from Rhone-Poulenc. In exchange, they signed a waiver of certain obligations against Rhone-Poulenc. When the severance pay agreement was negotiated in April of 1991, Plaintiffs insisted that it include the following provision concerning transferring to the organic plant:

> Qualifying for a position at the Organic Plant will make an individual ineligible under this Memorandum whereas failure to qualify for a position at the Organic Plant

will not make an individual ineligible. (TR. 626; Ex. P-1, Ex. P-17 at 48-50, Ex. P-18 at 165-170, Ex. P-19 at 11-14, 28.)

Employees who were not covered by the Cross-Bumping Agreement received the same severance pay as Plaintiffs. It was the intention of Plaintiffs by inserting the above quoted provision to not surrender their transfer rights by accepting severance pay. The severance pay agreement further provided:

> B. Prior to and as condition for receiving severance pay and other special considerations still due the employee under this Memorandum of Understanding, the employee whose seniority and employment with the Company is terminated under this Agreement shall sign a statement (a copy of which is attached) which acknowledges his/her receipt of said payments and benefit plan coverages and releases the Company from any and all pending and future obligations and liabilities arising out

> of employment with the Company, except for any unemployment compensation or worker's compensation claims that may be made and except as provided under the terms of this Memorandum of Understanding. (R. 162, ¶¶ 87, 107, 108; TR. 626; Ex. P-1, Ex. P-17 at 48-50, Ex. P-18 at 165-170, Ex. P-19 at 11-14, 28.)

The Union Constitution (Ex. P-51; TR. 530-532, 559-561) provides as follows:

1. It is "a contract between the member, his Local Union, the International Union and every other member therein" (pp. 87, 88).

2. The "organization shall be known as the International Union of Operating Engineers" (p. 5).

3. One of its purposes is to assist "Local Unions in negotiating collective bargaining agreements" (pp. 5, 6).

4. The International Union has the power to "issue charters for Local

Unions", "suspend and revoke any of said charters", "supervise the operation of Local Unions", "appoint supervisors and receivers when necessary", "prefer charges against Local Unions", "order trials with authority to discipline those affected", "adopt as part of the Constitution a procedure for the government and regulation of Local Unions", "provide for the general welfare of the organization and its members", "take all steps necessary to protect the interest of the organization", and "all other rights, powers, privileges and immunities not herein specifically denied" (pp. 9-11).

5. The International Union, through its General President, has the duty to interpret the Constitution "and decide questions of law arising thereunder" (Article VI(2) - p. 21) and has the "power to require Local Unions...and members to comply with this Constitution and any lawful rulings or orders

of the International Union" (Article VI(3) - p. 22).

6. The International Union, through its General President, for the purpose of "assuring the performance of collective bargaining agreements or other duties of a bargaining representative"[9] has "full power to suspend or remove such Local Officers, suspend or revoke charters of such Local Unions or place such Local Unions and their officers and members under International Supervision" (Article VI(3) - p. 22).

7. The General President "shall be strictly accountable and responsible for the faithful performance of his duties and shall administer and enforce every law, rule, regulation and requirement of the Constitution, Ritual and Obligation" (Article VI(5) - pp. 23, 24).

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[9]Underlining supplied.

8. The Constitution provides for dues, taxes and assessments (pp. 30-34).

9. Collective Bargaining Agreements and modifications thereof "shall not be executed until they have been presented at the next membership meeting following the negotiation of the proposed agreement and have been approved by the membership affected" (Article XXIV(11)(e) - p. 105).

12. Copies of all Collective Bargaining Agreements and modifications thereof "shall be filed with the General President immediately after execution" (p. 105).

The International Union was directly involved in the negotiation of the 1982 Cross-Bumping Agreement. The Interim Agreements for both plants at the conclusion of the 1982 negotiations were signed on behalf of both the International and Local 912. The International Union also participated in the

1985 and 1988 negotiations. (Ex. P-19 at 92-99, 102, Ex. P-18 at 96-101, 116, 117, 133-137, 176-183; Ex. P-26, Ex. P-27, Ex. P-28, Ex. P-52-55.)

The International Union regularly participated in grievance procedures under Collective Bargaining Agreements. Moreover, in Article XI of the various Collective Bargaining Agreements for the furnace and organic plant, in referring to Union representatives, states that "[a]n International Representative of the Union...shall when necessary have the use of an office at the plant during working hours for the purpose of investigating grievances". (Ex. P-18 at 96-101, 116, 117, 133-137, 176-183; Ex. P-19 at 92-99, 102, Ex. P-51, Ex. P-55, Ex. P-58, Ex. P-59.)

The annual report to the filed by the International Union with the United States Department of Labor shows, as of 12/31/91, net

assets after liabilities of $74,293,165.00. The annual report of Local 912 filed with the United States Department of Labor shows, as of 6/30/91, net assets after liabilities of $171,243.00. (Ex. P-57, Ex. P-56.)

ARGUMENT

I. THE CONSPIRACY OF THE DEFENDANTS.

The corporate Defendants exploited the conflict of interest situation the International Union and Local 912 found itself. The Union, both Local 912 and the International, was induced to breach its contractual and trust obligations to Plaintiffs. Conspiring for such a purpose is clearly illegal. Allen v. Allied Plant of Nashville, 881 F.2d 291 (6th Cir. 1989); Koehler v. Cummings, 380 F.Supp. 1294, 1313 (M.D. TN 1974).

Pertinent sections of the Restatement are as follows:

RESTATEMENT, SECOND, CONTRACTS

Section 193. Promise Inducing Violation of Fiduciary Duty.

A promise by a fiduciary to violate his fiduciary duty or a promise that tends to induce such a violation is unenforceable on grounds of public policy.

Section 194. Promise Interfering with Contract with Another.

A promise that tortiously interferes with performance of a contract with a third person or a tortiously induced promise to commit a breach of contract is unenforceable on grounds of public policy.

RESTATEMENT, SECOND, TRUSTS

Section 170. Duty of Loyalty.

(1) The trustee is under a duty to the beneficiary to administer the trust solely in the interest of the beneficiary.

(2) The trustee in dealing with the beneficiary on the trustee's own account is under a duty to the beneficiary to deal fairly with him and to communicate

> to him all material facts in connection with the transaction which the trustee knows or should know.[10]

The facts herein indicate that the Union and the corporate Defendants acted in concert and conspired with each other to deprive Plaintiffs of their vested contractual rights. All of the Defendants must have realized that their best hope of escaping their clear legal obligations was to let ICI agree with its own employees to delete the 1982 Cross-Bumping Agreement. After all, ICI would be making its agreement with its employees who would be displaced by Plaintiffs.

ICI, in its letter of December 12, 1990, stated it would aggressively pursue dismissal if the parties could not secure a prompt agreement. Since none of the parties actively pursued dismissal or resolution of

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[10] 29 U.S.C. 501(a) defines the fiduciary status of the Union. See also Brotherhood of Locomotive for Firemen v. Mitchell, 190 F.2d 308 (5th Cir. 1951).

the declaratory judgment action, it is obvious they reached some type agreement. The delay of the layoffs, the false representations to Plaintiffs by the Union, the correspondence between the Defendants, the circumstances of the declaratory judgment action and the June expiration date of the ICI contract all indicate conspiracy. The reasonable inferences to be drawn from the uncontroverted facts are more than sufficient to withstand a motion for summary judgment. Davidson & Jones Development Company v. Elmore Development Co., Inc., supra, 921 F.2d at 1349 (quoting United States v. Diebold, 369 U.S. 654, 655, 82 S.Ct. 993, 994, 8 L.Ed.2d 176 (1962)).

II. LIABILITY OF ICI.

In 1982, ICI's predecessor, Stauffer Chemical Company, wanted to have separate Collective Bargaining Agreements for the two plants rather than the one agreement for both plants in effect up to that date. To

secure the agreement of the employees to the new bargaining units, the employer promised that the employees would have a one time transfer right to the other plant in case of future layoffs. Plaintiffs accepted and fully performed their part of the bargain. From 1982, each plant has had a separate Collective Bargaining Agreement.

It is elementary that such acceptance creates a binding contract. 1 Corbin on Contracts, Sections 49, 63, 70, 71; Restatement, Second, Contracts, Sections 45, 50, 62.[11]

"After an acceptance has become effective, there is no power in either party to revoke or withdraw." 1 Corbin on Contracts, Section 38. Corbin further states that "of course, there is no power or revocation after the requested act has been

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[11] Part performance is sufficient for an acceptance. However, these Plaintiffs fully performed.

fully performed". 1 Corbin on Contracts, Section 49 n. 70. Corbin further states as follows at 4 Corbin on Contracts, Section 779J n. 7 (Supp., 1991):

> A right to future performance that is created by contract is a "contract right" even though the promisor's duty of immediate performance is subject to one or more conditions precedent. Upon fulfillment of the conditions, the right merely becomes unconditional.

The Cross-Bumping Agreement was not signed by Stauffer Chemical Company as a single employer. Instead, the contract was signed separately by both the furnace plant and the organic plant. From that moment, it was a vested liability of each plant and ICI assumed all those liabilities when it purchased both plants and certainly when it continued to operate the organic plant. Cincinnati Newspaper Guild v. Cincinnati Enquirer, 863 F.2d 439 (6th Cir. 1988); 15 William M. Fletcher, Fletcher Cyclopedia of

the Law of Private Corporations § 7121 (perm ed. rev. vol. 1990).

Moreover, ICI expressly assumed these liabilities when it agreed to the 1988 Collective Bargaining Agreement. The Cross-Bumping Agreement separately existed and was separately enforceable in addition to its enforcement as part of the 1988 Collective Bargaining Agreement. Smith v. Evening News, 83 S.Ct. 267; Hehemann v. E.W. Scripps Co., 661 F.2d 1115, reh. den. 668 F.2d 878 (6th Cir. 1981), cert. den. 456 U.S. 991, 73 L.Ed.2d 1286, 102 S.Ct. 2272; Farmer v. ARA Services, Inc., 660 F.2d 1096 (6th Cir. 1981).

In Hehemann, supra, the employer promised the employees lifetime employment if they would agree to use the new printing equipment. A separate agreement was executed which also incorporated the Collective Bargaining Agreement for purposes of pay and other conditions of employment. In the

renewal Collective Bargaining Agreement, the employment agreement was listed as remaining in effect. The Collective Bargaining Agreement expired in 1981. The Court held that the employment agreement was an existing contract which survived the expiration of the Collective Bargaining Agreement.

The one time transfer rights granted by the Cross-Bumping Agreement were fully vested in Plaintiffs in 1982 and could not be changed by subsequent collective bargaining without the consent and participation of Plaintiffs. The Supreme Court, in United Mine Workers of America Health & Retirement Funds v. Robinson, 455 U.S. 562, at 575, n. 14, 102 S.Ct. 1226, at 1234 n. 14, 71 L.Ed.2d 419, at 430 n. 14 (1982), specifically acknowledged that similar vested contract rights (pensions) may not be altered unilaterally:

> We also recognize [in *Allied Chemical & Alkali Workers v.*

> *Pittsburgh Plate Glass Co.*, 404 U.S. 157, 92 S.Ct. 383, 30 L.Ed.2d 341 (1971)] that [retirees] are not without protection: "Under established contract principles, vested retirement rights may not be altered without the pensioner's consent. See generally Note, 70 Col.L.Rev. 909, 916-920 (1970). The retiree, moreover, would have a federal remedy under § 301 of the Labor Management Relations Act for breach of contract if his benefits were unilaterally changed. See *Smith v. Evening News Assn.*, 371 U.S. 195, 200-201 [83 S.Ct. 267, 270-271, 9 L.Ed.2d 246] (1962); *Lewis v. Benedict Coal Corp.*, 361 U.S. 459, 470 [80 S.Ct. 489, 495, 4 L.Ed.2d 442] (1960)." 404 U.S., at 181, n. 20 [92 S.Ct., at 398 n.20].

This Court, in Weimer v. Kurz-Kasch, Inc., 773 F.2d 669 (6th Cir. 1985), held that such vested contract rights survive the expiration of the underlying Collective Bargaining Agreement. See also Hehemann v. E.W. Scripps Co., supra.

ICI's basic argument is that its contractual obligations to Plaintiffs were superseded by a June, 1991 agreement it executed with a third party, the bargaining unit for the organic plant whose interests were contrary to the interest of the Plaintiffs. This is the same as a contractor arguing that his obligations to pay a provider for past services have been superseded by a contract it entered with a competing provider containing a provision that the contractor did not have to pay the first provider. If ICI wishes to supersede its contractual obligations to Plaintiffs, it must execute such an agreement with Plaintiffs, not with third parties.

This Court has expressly held that whether a right is vested depends upon the intention of the agreement. The parties have full authority in a collective bargaining situation to create vested rights not subject

to future termination. In Re White Farm Equipment Co., 788 F.2d 1186, 1193 (6th Cir. 1986); Policy v. Powell Pressed Steel Company, 770 F.2d 609 (6th Cir. 1985).

Moreover, ICI's contract with a third party to its own employees is void because it was secured by inducing Local 912 to breach trust and contractual obligations to Plaintiffs. Koehler v. Cummings, supra, 380 F.Supp. at 1313. Restatement, Second, Contracts, Sections 193, 194; Restatement, Second, Trusts, Section 170. In any event, there are clear issues of intent, creating a jury issue and making summary judgment inappropriate. Davidson & Jones Development Company v. Elmore Development Co., Inc., supra.

III(a). **LIABILITY OF RHONE-POULENC UNDER CROSS BUMPING AGREEMENT.**

Rhone-Poulenc is admittedly a successor to Stauffer Chemical Company under the 1985 Collective Bargaining Agreement for

the furnace plant. Moreover, Rhone-Poulenc subsequently executed Collective Bargaining Agreements in 1988 and 1991 expressly incorporating the Cross-Bumping Agreement. Rhone-Poulenc is presently operating under the 1991 agreement. The included Cross-Bumping Agreement is crystal clear that Rhone-Poulenc promised Plaintiffs, their employees, a one time transfer right to the ICI Americas Inc. plant in the event Rhone-Poulenc laid them off. Rhone-Poulenc is bound by its promise. Smith v. Evening News, 371 U.S. 195, 83 S.Ct. 267, 9 L.Ed.2d 246 (1962); Hehemann v. E.W. Scripps Co., 661 F.2d 1115, reh. den. 668 F.2d 878 (6th Cir. 1981), cert. den. 456 U.S. 991, 73 L.Ed.2d 1286, 102 S.Ct. 2272; Farmer v. ARA Services, Inc., 660 F.2d 1096 (6th Cir. 1981).

The difficulty with enforcing the Cross-Bumping Agreement was foreseeable and indeed known at the time Rhone-Poulenc assumed the 1985 contract and signed the 1988 and 1991 contracts. Thus, the impossibility doctrine

is not applicable but in any event, Rhone-Poulenc failed to carry its burden of proof on this issue. McCalden v. California Library Ass'n, 919 F.2d 538, 543 (9th Cir. 1990) (955 F.2d 1214, 1219); John D. Calamari & Joseph M. Perillo, Contracts, §§ 186, 198 (1970).

The District Court in its earlier memorandum decision of 6/29/93 (R. 171 at 15, 16) stated as follows concerning the impossibility defense:

> The contention of the R-P defendants that merely permitting the plaintiffs to transfer to the organic plant satisfies their obligations is fanciful. Granted, they may have difficulty forcing ICIA to give the plaintiffs jobs at the organic plant, especially since the cross-bumping agreement has been deleted from the organic plant collective bargaining agreement, but the R-P defendants have only themselves to blame. Before their purchase of the Stauffer Chemical Company stock in 1987, ordinary due diligence should have made them aware of the obligations of the corporation they were

purchasing. It is a basic principle of corporate law that "[i]n case of merger of one corporation into another, where one of the corporations ceases to exist and the other corporation continues in existence, the latter corporation is liable for the debts, contracts and torts of the former." 15 William M. Fletcher, Fletcher Cyclopedia of the Law of Private Corporations § 7121 (perm ed. rev. vol. 1990). Stauffer Chemical Company had promised the plaintiffs jobs at the organic plant, and when the R-P defendants bought Stauffer Chemical Company, they assumed that obligation. Prior to the purchase of Stauffer Chemical Company, the R-P defendants could have contracted with ICIA to reserve jobs at the organic plant or they could have contracted with Local 912 to surrender the plaintiffs' rights to transfer. However, they did neither. Moreover, in 1988 R-P Basic explicitly adopted the cross-bumping agreement by incorporating it into its own collective bargaining agreements for the furnace plant. The fact that ICIA has refused to accept the laid-off furnace plant employees does not relieve R-P Basic of its own independent promise to them.

> Pacta sunt servanda -- contracts are to be kept. See generally Restatement (Second) of Contracts, Introductory Note to ch. 11; John D. Calamari & Joseph M. Perillo, Contracts 536 (3d ed. 1987) (Even though an equity court will not grant specific performance when a promise is impossible to perform, the breaching party is still liable in damages.).

Rhone-Poulenc signed the contract with full knowledge of the problems involved. It is in no position to argue frustration. Restatement, Second, Contracts, § 2661.[12] Moreover, it assumed liability for Stauffer

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[12] Restatement, Contracts, Second, § 2661 provides:

> (1) Where, at the time a contract is made, a party's performance under it is impracticable without his fault because of a fact of which he has no reason to know and the non-existence of which is a basic assumption on which the contract is made, no duty to render that performance arises, unless the language or circumstances indicate the contrary.
>
> (2) Where, at the time a contract is made, a party's principal purpose is substantially frustrated without his fault by a fact of which he has no reason to know and the non-existence of which is a basic assumption on which the contract is made, no duty of that party to render performance arises, unless the language or circumstances indicate the contrary.

Chemical Company who is clearly bound by the contract. Rhone-Poulenc has not met its burden of proof but the most it could do, is create a jury issue. The record does not support a judgment of dismissal as a matter of law under Rule 50. Tuck v. HCA, 7 F.3d 465 (6th Cir. 1993).

III(b). **EFFECT OF MEMORANDUM AGREEMENT OF OCTOBER 13, 1988, ON LIABILITY OF RHONE-POULENC.**

The District Court, in the memorandum decision on the summary judgment motions, held the memorandum agreement of October 13, 1988, to be ambiguous and not appropriate for summary judgment. (R. 171 at 16, 17.) The District Court discussed the Memorandum Agreement of October 13, 1988, in ruling on the Rule 50 motion for judgment as a matter of law. However, the Court based its holding on the impossibility argument. (Bench ruling, TR. at pp. 725-749).

The District Court stated in its

memorandum decision on the summary judgment motions that in reference to the October 13, 1988, agreement "[a] logical reading is that employees who are covered by the cross-bumping agreement are to be laid off in accordance with that agreement (in other words, transferred to the organic plant, and that other employees are to be laid off by seniority)". (R. 171, memorandum of the Court at pp. 16, 17.) No other construction makes sense.

Rhone-Poulenc's argument on this issue is based on the assumption that the "or" in the October 13, 1988, agreement cannot possibly mean "and". However, it is well-established that where consistent with intent "or" is frequently construed as "and". Noell v. American Design, Inc., 764 F.2d 827, 833 (11th Cir. 1985); Williston on Contracts, Third Edition, Section 619, p. 738.

If there is any validity to Rhone-Poulenc's construction of the October 13, 1988, agreement, the document is clearly ambiguous. Thus, Rhone-Poulenc's construction only creates a jury issue. (See n. 10, R. 171 at 17.) There must be a complete absence of evidence to support Plaintiffs before a Rule 50 judgment as a matter of law would be appropriate. Tuck v. HCA, supra.

III(c). **EFFECT OF WAIVER UNDER MEMORANDUM AGREEMENT OF APRIL 19, 1991, ON LIABILITY OF RHONE-POULENC.**

Not only were the transfer rights under the memorandum agreement of September 13, 1982, not specifically mentioned in the agreement or waiver as being released, the provisions recognized the intention of the parties that the Plaintiffs could pursue their transfer rights. Certain of the employees receiving severance pay, who had no transfer rights under the Memorandum Agreement of September 13, 1982, had equal or greater

seniority to some of the Plaintiffs. All of the terminated employees received severance pay computed in the same manner. (Ex. P-1 - Paley Affidavit.)

Moreover, at the time of the severance payment, Rhone-Poulenc was refusing to honor Plaintiffs' contractual transfer rights. Rhone-Poulenc stated Plaintiffs had no enforceable transfer rights against them (Ex. P-1 - Paley Affidavit; Ex. P-4). Such misleading statements, even if made in good faith, would be sufficient to invalidate the waiver as to these particular claims. Ott v. Midland-Ross Corp., 600 F.2d at 30, 31 (6th Cir. 1979).

To require Plaintiffs as a condition of receiving the same severance pay given all other employees to also surrender contract rights which Rhone-Poulenc was refusing to honor in any event, is unconscionable and amounts to overreaching.

Such a waiver or release is void as a matter of law. T.C.A. 47-2-302. Since no additional amount was paid over severance pay given to other employees, there is also a want of consideration. T.C.A. 47-50-104. See also Street v. J.C. Bradford & Co., 886 F.2d 1472, 1481 (6th Cir. 1989); Ott v. Midland-Ross Corp., supra.

In any event, the ambiguity of the agreement, especially after the transfer clause was added at Plaintiffs' insistence, creates jury issues of intent. Accordingly, summary judgment for Rhone-Poulenc on this issue was inappropriate. Davidson & Jones Development Company v. Elmore Development Co., Inc., supra.

IV. LIABILITY OF INTERNATIONAL UNION AND LOCAL 912.

(a) Breach of Duty of Fair Representation.

Under a hybrid § 301/duty of fair representation claim, the employee must prove

that the Union breached its duty of fair representation and that the employer breached the Collective Bargaining Agreement before the employee may recover from either of them. Hines v. Anchor Motor Freight, Inc., 424 U.S. 554, 563, 96 S.Ct. 10408, 1055, 47 L.Ed.2d 231, 241 (1976); Bagsby v. Lewis Bros., 820 F.2d 799, 801 (6th Cir. 1987). (R. 171, memorandum of the Court at 18.)

In the Bench ruling, the District Court did not reach the duty of fair representation claim under the hybrid § 301 action since he ruled that the employer, Rhone-Poulenc, was excused because of impossibility. (TR. at pp. 725-749.) However, in the earlier memorandum decision, the District Court described the actions of Local 912 as "a complete sellout of an entire bargaining unit". (R. 171 at 33, 34.)

The District Court in the memorandum decision (R. 171) held the

International Union was separate from Local 912. However, the International Union was a full participant. It knew of and authorized all the actions of the Local Union. Indeed, the Union Constitution required the Local Union to keep the International Union fully informed.[13] Certainly, independent action by the Local Union, without notification of the International Union, was not permissible under the Constitution.

The International Union's method of operation is to set up financially irresponsible Local Unions (Ex. P-56, Ex. P-57). The Local Unions have no significant assets and take out no insurance policies to cover their liabilities. The International Union fully controls all actions of the Local

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[13]After receiving full notification concerning the plant closing and conflict of interest ramifications, the International Union, for the first time, failed to send a representative to the 1991 Collective Bargaining Agreements and also did not appear in the declaratory judgment action. It is unbelievable that the Local Union was not fully instructed by the International Union on filing the declaratory judgment action and the method of proceeding in the 1991 negotiations.

Unions. After the Local Unions, at the direction of the International Union, violates the rights of the member, the International then disavows all responsibility.

The extent of such control is shown by the Findings of Fact in the Allen case (Ex. P-58). In that case, the International even offered the employer to substitute another Local. The International Union, under the Constitution, has absolute authority to issue and revoke charters of Local Unions. In this case, the International Union had the knowledge, authority and responsibility to remedy all of the Plaintiffs' complaints.

This Court in Allen v. Allied Plant of Nashville, 881 F.2d 291 (6th Cir. 1989), held this same International Union liable for its participation. The International Union made the same legal arguments in the Allen case that it is making in this case.

Shimman v. Frank, 625 F.2d 80 (6th

Cir. 1980), relied upon by the International Union, does not support its position. In that case, a Local Union official assaulted a member. The International Union had no control or participation in the event. The Sixth Circuit emphasized in Shimman that the decision would be different if there was some proof of "participation or ratification" by the International Union. 625 F.2d at 998. Indeed, the Sixth Circuit subsequently in Allen v. Allied Plant of Nashville, supra, found some participation by the International Union in the grievance procedure sufficient for liability.

Moreover, the International Union has an independent duty of fair representation. It knew and approved of the conflict of interest situation which arose as soon as the Cross-Bumping Agreement was executed in 1982. Faced with this conflict, the Union had continually advised members of

the separate bargaining unit that one bargaining unit could not affect the rights of the other bargaining unit in relation to the Cross-Bumping Agreement. The International Union should have withdrawn from representing one or other of the bargaining units as soon as the conflict arose. Instead, it continued to collect dues from all members of both units.

Such actions by the International Union violated its independent duty of fair representation to Plaintiffs. Brotherhood of Locomotive for Firemen v. Mitchell, 190 F.2d 308 (5th Cir. 1951). Moreover, this duty of fair representation by the International Union is expressly recognized by Article VI(5) of the Constitution. The International was fully apprised of the Local Union's intention to discontinue the grievance on the ground that if the grievance were granted, it would damage the ICI bargaining unit.

The standard of care that a Union must exercise under its duty of fair representation is to serve the interest of all members without hostility or discrimination towards any, to exercise its discretion with complete good faith and honesty and to avoid arbitrary conduct. Vaca v. Sipes, 386 U.S. 171, 177, 87 S.Ct. 903, 910, 17 L.Ed.2d 842, 850.

A wide range of reasonableness is allowed a Union when it is serving the members within a particular unit but this standard is not applicable where the Union is acting in favor of one unit to the complete exclusion of another unit that had no participation in the negotiating process. Humphrey v. Moore, 375 U.S. 335, 349, 84 S.Ct. 363, 372, 11 L.Ed.2d 370, 382 (1964); Airline Pilots Assoc. v. O'Neill, 499 U.S. _____, 111 S.Ct. 1127, 1134, 113 L.Ed.2d 51, 63 (1991); Ford Motor Company v. Huffman, 345 U.S. 330, 337, 73 S.Ct. 681,

686, 97 L.Ed. 1048, 1057 (1953); R. 171, memorandum of the Court, pp. 33-35.

Finally, exactly what the Union, both the International and Local 912, did here should be examined. It had a conflict of interest and for its own interest, it favored less senior employees. This violated the very cornerstone of the Union movement, which is seniority.[14] (Ex. P-18 at 146, 147, 202.) Indeed, in the Humphrey v. Moore, 375 U.S. 335, 84 S. Ct. 363, 11 L.Ed.2d 370 (1964), the Supreme Court approved the Union's decision when it favored the most senior employees. The Court emphasized that this was the accepted and standard procedure. Here, the Union's acts were hostile and discriminatory. The Union, acting to protect itself from a conflict of interest situation, favored the least senior employees. Brotherhood of

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[14] Mr. Kincade acknowledged this. (Ex. P-8 at 146, 147, 202).

Locomotive for Firemen v. Mitchell, 190 F.2d 308 (Fifth Cir. 1951); see also, Allen v. Allied Plant of Nashville, supra.

(b) Breach of the Union Constitution.

The Union Constitution is a contract that can be enforced by Plaintiffs. Wooddell v. International Bd. of Elec. Workers, 502 U.S. _____, 112 S.Ct. 494, 116 L.Ed.2d 419 (1991). A § 301 cause of action arises against a Union if it denies members the right to vote on a proposed contract in violation of the Union Constitution. Ackley v. Western Conference of Teamsters, 958 F.2d 1463, 1477 (9th Cir. 1992); R. 171, memorandum of the Court, 27.

This suit under the Union Constitution is different from a hybrid § 301 claim. Instead, it is a straightforward breach of contract suit and the plaintiff need only establish that the Union violated a

contractual provision of the Constitution. United Steel Workers of America v. Rawson, 110 S.Ct. 1904, 1912 (1990); IBEW, AFL-CIO v. Hechler, 481 U.S. 851, 863-865, 107 S.Ct. 2161, 2169, 2170 (1987); DelCostello v. Teamsters, 462 U.S. 151, 162, 165, 103 S.Ct. 2281, 2289, 2291, 76 L.Ed.2d 476 (1983); Autoworkers v. Hoosier Cardinal Corp., 383 U.S. 696, 86 S.Ct. 1107, 16 L.Ed.2d 192 (1966).

The Union knew from June of 1990 that if it permitted ICI and the ICI bargaining unit to negotiate the June, 1991, contract without the participation of Plaintiffs, that Plaintiffs' rights would be seriously damaged. It falsely represented to Plaintiffs continuously up until the approval of the June, 1991, ICI contract that the ICI bargaining unit could not affect Plaintiffs' rights under the Cross-Bumping Agreement. Immediately after the execution of the new

contract, the Union took the position that Plaintiffs' rights were terminated. The Union violated its express obligations to Plaintiffs under Articles VI(2)(3) and (5) and XXIV(11)(e). At the very least, jury issues concerning the contractual breaches were created. Accordingly, judgment as a matter of law under Rule 50 was inappropriate. Tuck v. HCA, supra.[15]

V. RHONE-POULENC'S INTERNAL MEMORANDUM OF 9/13/88 SHOULD HAVE BEEN ADMITTED IN EVIDENCE.

The parties stipulated to the authenticity of Rhone-Poulenc's internal memorandum by Mr. Suydam of 9/13/88. It was offered as Trial Exhibit P-10 (same as Ex. P-4 on motions) and it is relevant on its face.

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[15]The District Court in the Bench ruling also indicated that Plaintiffs agreed there was no violation of Article VI(3). It was Plaintiffs' position that International Supervision (Trusteeship) was not required but that the General President had a broad range of powers which could have been exercised. The failure to do so was a violation of Article VI(3). (See argument of Plaintiffs' counsel to Court, TR. 484, 485, 499-519, 539-552, 659-665, 687-702, 710, 712, 715-718.)

The document was offered twice at relevant times although the witness had no personal knowledge of the memorandum. (TR. 340, 341, 628-634.) The Court ruled that a witness with personal knowledge of the exhibit must testify to the exhibit. (TR. 634.) It was offered the second time after extensive cross-examination of the witness concerning positions of the author of the memorandum. (TR. 577-594, 597-608.)

Once authenticity is established, an exhibit is admissible if relevant and not subject to a specific objection under the Federal Rules of Evidence. It is admissible without the necessity of a witness with specific personal knowledge to further identify the document. Rules 402 and 901 of the Federal Rules of Evidence; McCormick on Evidence (3rd ed. 1984) § 227, p. 698); 7 Wigmore, Evidence §§ 2128(3), 2130-2132.

(After authentication, "counsel" may read or submit document to jury.)

CONCLUSION

Plaintiffs were promised a one time transfer to the organic plant if they were laid off from the furnace plant. Defendants failed to keep their promise. No plaintiff or any bargaining unit representing plaintiffs ever agreed to the termination of their one time transfer right. For the foregoing reasons, plaintiffs respectfully request that the judgment below be reversed and this matter be remanded for a new trial on all issues.

Respectfully submitted,

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BY: /s Frank Steiner

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CERTIFICATE OF SERVICE

I hereby certify that two copies of the foregoing have been mailed to Cary Schwimmer, Esq., Young & Perl, P.C., 2380 One Commerce Square, Memphis, Tennessee 38103, William N. Ozier, Esq., Bass, Berry & Sims, 2700 First American Center, Nashville, Tennessee 37238, C. Dewey Branstetter, Jr., Esq., Branstetter, Kilgore, Stranch & Jennings, 200 Church Street, Nashville, Tennessee 37201 and to George E. Barrett, Esq., Barrett, Johnston & Parsley, 217 Second Avenue North, Nashville, Tennessee 37201-1601, this 7th day of April, 1994.

/s Frank Steiner
Frank Steiner

OMISSIONS

91053B2

IN THE UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

ALBERT AKINS, et al.,	)	
	)	
Plaintiffs - Appellants,	)	
	)	
TONY BROCK, et al.,	)	
	)	
Plaintiffs,	)	
	)	
v.	)	NO. 94-5132
	)	
ZENECA, INC.,; RHONE-POULENC, INC.; RHONE-POULENC BASIC CHEMICALS COMPANY; STAUFFER CHEMICAL COMPANY; INTERNATIONAL UNION OF OPERATING ENGINEERS, AFL-CIO; LOCAL 912 INTERNATIONAL UNION OF OPERATING ENGINEERS, AFL-CIO,	)	
	)	
Defendants - Appellees.	)	

APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF TENNESSEE -
COLUMBIA DIVISION

APPELLANTS' REPLY BRIEF

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Attorney for Appellants

OMISSIONS

REPLY ARGUMENT

Defendants' arguments at best establish factual disputes requiring a trial. Defendants create factual disputes by misstating the record, directly and indirectly contradicting plaintiffs' statement of facts and drawing illogical conclusions from admitted facts. At the same time, defendants argue there are no controverted facts.

Based on the evidentiary record, the facts are as stated in plaintiffs' brief.[1] Plaintiffs' further specifically respond to defendants' briefs as follows:

I. DEFENDANTS CONSPIRED TO DESTROY PLAINTIFFS' ONE TIME TRANSFER RIGHTS UNDER THE CROSS-BUMPING AGREEMENT IN VIOLATION OF TRUST AND CONTRACTUAL

[1] If defendants would agree the facts are as stated in plaintiffs' brief, there would be no factual controversy. Rhone-Poulenc, the Local Union and ICI have designated various of their briefs for inclusion in the appendix. Reliance on such non-evidentiary documents illustrates the lack of evidentiary support in the record for defendants' assertions.

OBLIGATIONS.

The declaratory judgment action filed by Local Union 912 was a sham. (Exs. P-34, P-35, P-36.) It claimed jurisdiction under § 301 of the LMRA, 29 U.S.C. § 185. Yet, the Local Union had made no effort to utilize the grievance procedures under the Collective Bargaining Agreement to resolve the issue. Accordingly, based on this issue alone, all the defendants had to do was file a motion to dismiss. Vaca v. Sipes, 386 U.S. 171, 177, 87 S.Ct. 903, 910, 17 L.Ed.2d 842, 850 (1967).

Further, the complaint in the declaratory judgment action asked the Court to declare the "validity" of the Cross-Bumping Agreement. There is no jurisdiction under § 301 to declare the validity of a Collective Bargaining Agreement. Accordingly, on this issue also, all the defendants had to do was file a motion to dismiss. Huessner v.

National Gypsum Co., 887 F.2d 672, 676 (6th Cir. 1989); see also Adcox v. Teledyne, Inc., No. 93-3078, 1994 U.S. App. LEXIS 7811 (6th Cir. April 19, 1994 - copy attached to ICI brief).

Moreover, the declaratory judgment action only sought a simple legal interpretation of the Cross-Bumping Agreement. None of the parties to the declaratory judgment action filed a motion to dismiss or for summary judgment. Instead, they simply waited eight months until ICI, with the Local Union, could remove the Cross-Bumping Agreement from the Collective Bargaining Agreement for the organic plant.[2] The layoffs, which had been scheduled for February of 1991, were delayed by Rhone-Poulenc until

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[2] ICI erroneously states as a matter of fact that the declaratory judgment action was "vigorously litigated". (ICI brief, p. 14.) In this case, which is much more complicated, the complaint was filed on November 14, 1991 (R. 1), and ICI's motion to dismiss was filed on January 9, 1992 (R. 20), a period of less than two months.

immediately after Local Union 912 and ICI executed the new contract in June of 1991. Throughout this delay period, Local Union 912 continually represented to plaintiffs, with full knowledge that such representations were false, that the actions of the ICI bargaining unit could not affect plaintiffs' rights. (Exs. P-1, P-7, P-14, P-17 at 37, 107-109, 121-124, 114-116, 160, 161, 167, P-40, P-41; TR. 346, 347, 350, 351, 443, 444, 570-573.)

Rhone-Poulenc argues that the delay in the layoffs was due to delays in production at the new Louisiana plant. However, the Louisiana plant began production and shipment in February of 1991 as expected. By law, Rhone-Poulenc was required to give 60 days notice of the layoff. At the time this notice was scheduled to be given, Rhone-Poulenc could not possibly have known that it would subsequently have production delays in the new Louisiana plant. Moreover, on June 20, 1990,

Rhone-Poulenc announced some of the production would be shifted to the Montana plant but made no reference to the Louisiana plant. (Ex. P-13, P-32; cf. Rhone-Poulenc's Appendix D to motion for summary judgment - Hunsucker aff. - R. 43.)

Rhone-Poulenc's decision to postpone the layoffs had to be made between November 19, 1990 (Exs. P-5, P-33), and December 6, 1990, the date of its answer (Ex. P-37). The only reason for the postponement that makes sense and is consistent with the contemporary documents is that Rhone-Poulenc delayed the layoffs to permit ICI and the Union to remove the 1982 Cross-Bumping Agreement from the ICI contract.[3]

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[3]The Trial Court, in the memorandum decision on the summary judgment motions, did not accept the reasons suggested by Rhone-Poulenc for the delay. The Trial Court did specifically find that only after the commencement of the declaratory judgment action, did Rhone-Poulenc indicate the layoffs might be delayed. (R. 171 at p. 9.)

The International Union argues that it is not part of the conspiracy, claiming its only connection is the letters of June 26, 1990, and July 10, 1991. This ignores that the Local Union continually sought the advice of "IUOE's legal department" as recognized by Mr. Kincade's letter of July 16, 1991. (Ex. P-10; cf. P-18 at 134-137.) Moreover, the International Union had participated in negotiating all Collective Bargaining Agreements for both plants from 1982 up until 1991. (Exs. P-52-55, P-19 at 92-99, 102, P-18 at 96-101, 116, 117, 176-183, P-26, P-27, P-28; R. 54 - Ex. 1 to Appendix A, p. 23.) The facts involved here compel the conclusion that the declaratory judgment action was filed with the knowledge, consent and participation of the International Union.[4]

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[4]The International Union has not submitted an affidavit or other document indicating it had no prior knowledge of the declaratory judgment action.

Tennessee uniformly recognizes the tort of conspiracy. Nashville Memorial Hospital, Inc. v. Binkley, 534 S.W.2d 318, 321 (Tenn. 1976 - "everyone has the right to establish and conduct a lawful business or engage in a lawful profession, and is entitled to the protection of organized society, through its courts, whenever that right is unlawfully invaded"); Kirsey v. Overton Pub. Inc., 739 S.W.2d 230 (Tenn. App. 1987); Hayes v. Schweikart's Upholstering Co., 402 S.W.2d 472 (Tenn. App. 1966 - not necessary to prove particular agreement but sufficient if fair preponderance of evidence shows a working in harmony to promote a common purpose and corporate officer must be loyal to his trust and avoid conflicts in interest); Franklin v. Green, 342 S.W.2d 233, 236 (Tenn. App. 1960 - conspiracy even though defendants made it appear they participated separately and independently of each other).

This Court has also recognized the tort of conspiracy under Tennessee law. Carruthers Ready-Mix, Inc. v. Cement Masons Local Union, 779 F.2d 320 (6th Cir. 1985); Continental Motel Brokers, Inc. v Blankenship, 739 F.2d 226 (6th Cir. 1984); Edwards v. Travelers Ins. of Hartford, Conn., 563 F.2d 105, 119 (6th Cir. 1977). In Carruthers, supra, 779 F.2d at 324, the Court stated:

> [E]very man has the right of property in his own labor, and the right to work without interference; and whoever intentionally interferes with this right is liable in tort for the damage caused...

Federal law also recognizes conspiracy and tortious interference with contract. Allen v. Allied Plant of Nashville, 881 F.2d 291 (6th Cir. 1989[5]); Wilkes-Barre Pub. v. Newspaper Guild, 647 F.2d 372 (3rd Cir. 1981), cert. den. 182 S.Ct. 1003. Accordingly, under either federal or state

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[5]ICI incorrectly cites the Allen case for the opposite of its actual holding. (ICI brief, p. 22.)

law, plaintiffs have established a valid claim of conspiracy and tortious interference.

II. ICI IS LIABLE TO PLAINTIFFS BECAUSE:

(1) PLAINTIFFS' ONE TIME TRANSFER RIGHTS TO THE ORGANIC PLANT UNDER THE CROSS-BUMPING AGREEMENT WERE VESTED AND FULLY BINDING ON ICI;

(2) NO PLAINTIFF OR ANY BARGAINING UNIT REPRESENTING PLAINTIFFS EVER AGREED WITH ICI TO CANCEL THE CROSS-BUMPING AGREEMENT; AND

(3) ICI SECURED THE DELETION OF THE CROSS-BUMPING AGREEMENT FROM ITS 1991 COLLECTIVE BARGAINING AGREEMENT BY INDUCING THE LOCAL UNION TO BREACH ITS CONTRACTUAL AND TRUST OBLIGATIONS TO PLAINTIFFS AND ACCORDINGLY, SUCH DELETION IS VOID.

In Hehemann v. E.W. Scripps Co., 661 F.2d 1115, reh. den. 668 F.2d 878 (6th Cir. 1981), cert. den. 456 U.S. 991, 73 L.Ed.2d 1286, 102 S.Ct. 2272, this Court enforced a lifetime employment agreement as compared to the much more limited one time transfer rights agreed to in this case. The lifetime employment agreement was a side agreement which was also listed in the primary Collective Bargaining Agreement just as the Cross-Bumping Agreement was listed in this action. The primary Collective Bargaining Agreement expired but the Court held that the side agreement concerning lifetime employment was separately enforceable.

ICI Argues that Hehemann is not applicable for three reasons. First, it claims it was not a signatory to the Cross-Bumping Agreement. Second, it claims that the parties in Hehemann had not negotiated a superseding Collective Bargaining Agreement

such as ICI and the Local Union did in the present case. Third, it claims that the contract is more specifically stated in Hehemann than here, especially in regard to permanency. (ICI brief, p. 32.)

In reply to ICI's first argument, the original Cross-Bumping Agreement was signed separately on behalf of both plants. The original Cross-Bumping Agreement was also separately executed by the negotiating committees for both bargaining units. ICI owned and operated both plants under the 1985 Collective Bargaining Agreements executed by Stauffer Chemical Company.

ICI later sold the furnace plant to Rhone-Poulenc. ICI concedes that Rhone-Poulenc is the successor to Stauffer Chemical Company but continues to insist that it is not a successor. Moreover, in 1988, ICI signed a contract expressly agreeing to be bound by the 1982 Cross-Bumping Agreement.

There is no legal authority even hinting that a contracting party may urge as a defense to the contract, "I only agreed to a certain provision because the other party would not contract with me otherwise." Even Rhone-Poulenc recognized in the Suydam Memorandum of September 13, 1988, that ICI was bound by its 1988 agreement in spite of ICI's statement that it would not honor its agreement (Ex. P-4).

As a matter of law, ICI was a successor to Stauffer Chemical Company. Howard Johnson Co. v. Detroit Joint Bd., Hotel & Restaurant Employees, 417 U.S. 249, 263, 94 S.Ct. 2236, 2244, 41 L.Ed.2d 46, 57 (1974); General Teamsters v. Bill's Trucking, Inc., 493 F.2d 956 (3rd Cir. 1974). But in any event, it was also a signatory to the 1988 Collective Bargaining Agreement whereby it

expressly agreed to be bound by the Cross-Bumping Agreement.[6]

As to ICI's second argument, it makes no significant difference whether a Collective Bargaining Agreement expires or is superseded. The validity of the expired or superseded agreement cannot be litigated under Section 301. Huessner v. National Gypsum Co., supra.[7]

As to ICI's third argument, the Cross-Bumping Agreement is complete on its face. The lifetime employment agreements in Hehemann were dependent upon the underlying collective bargaining contract for its most significant terms and conditions, including pay.

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[6]Actually, ICI should have resolved the cross-bumping issue when it owned and operated both plants. But instead, it adopted the tactic of assuming and signing the contract but stating it would not honor the agreement.

[7]The Cross-Bumping Agreement here is an existing contract with ICI. It is neither superseded nor expired.

Here, plaintiffs fully performed their part of the bargain. ICI's obligations are just as permanent as any other contract where there has been full performance. ICI received the fruits of that bargain in that the two plants still have separate Collective Bargaining Agreements. But in any event, Stauffer Chemical Company received full performance by plaintiffs in 1982.[8]

Under such circumstances, plaintiffs' one time transfer rights are vested and ICI must contract with the individual plaintiffs for the release of those rights. Moreover, even if it should be concluded that the applicable bargaining unit could modify those rights, there is no contract with any bargaining unit representing plaintiffs concerning these rights.

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[8]Rhone-Poulenc has agreed that it is responsible for any liability of Stauffer Chemical Company. (TR. 248, 249.)

The Cross-Bumping Agreement involved here is an existing contract. Under corporate law, a "merger of one corporation into another, where one of the corporations ceases to exist and the other corporation continues in existence, the latter corporation is liable for the debts, contracts and torts of the former". Stauffer Chemical Company had promised the plaintiffs jobs at the organic plant, and when ICI bought Stauffer Chemical Company, it assumed that obligation. 15 William M. Fletcher, Fletcher Cyclopedia of the Law of Private Corporations § 7121 (perm ed. rev. vol. 1990).

ICI basically argues that basic contract principles should be ignored. In this case, we have fundamental issues of offer and acceptance which have been basic to the development of a civilized society. In Hehemann, in rejecting a similar argument to

the argument by ICI here, the Court, 661 F.2d at 1121, stated:

> Although this Court has recognized that not all principles of general contract law are applicable in the interpretation and construction of collective bargaining agreements, *Kellogg Co. v. N.L.R.B.*, 457 F.2d 519, 524 (6th Cir.), *cert. denied.*, 409 U.S. 850, 93 S.Ct. 58, 34 L.Ed.2d 92 (1972), it is usually held that general contract principles of offer and acceptance are applicable in determining whether an enforceable labor agreement exists at all. *United Steelworkers v. Bell Foundry Co.*, 626 F.2d 139, 140 (9th Cir. 1980); *F. W. Means & Co. v. N.L.R.B.*, 377 F.2d 683, 686 (7th Cir. 1967). *See Kentucky Skilled Craft Guild v. General Electric Co.*, 431 F.2d 62, 66-67 (6th Cir. 1970).[9]

Finally, even if it should be held that plaintiffs' rights were not vested nor still existent, ICI should not be permitted to

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[9] An examination of the cited cases reveals that it is extremely rare, if ever, that the Courts actually fail to follow basic contract principles.

retain the benefits it received from inducing Local Union 912 to breach its contractual and trust obligations to plaintiffs. ICI fully exploited the conflict of interest situation to its own advantage. All parties are held to the duty of good faith and fair dealing. Hooks v. Gibson, 842 S.W.2d 625, 628 (Tenn. App. 1992); Williams v. Maremont Corp., 776 S.W.2d 78, 81 (Tenn. App. 1988).

ICI's primary defense to this action is the agreement it made with Local Union 912 and the ICI bargaining unit to delete the Cross-Bumping Agreement from the ICI contract. ICI secured this deletion by inducing Local Union 912 to breach contractual and trust obligations to plaintiffs. ICI is estopped to rely upon such deletion and as a matter of law, the deletion is void. Restatement, Second, Contracts, Sections 193, 194. See also, Brotherhood of Locomotive Firemen, etc. v. Mitchell, 190 F.2d 308, 312,

313 (5th Cir. 1951 - if bargaining agent discriminates against nonmembers, employer is not "entitled to take the benefit of a contract which the bargaining representative is prohibited by the statute from making"). Summary judgment for ICI was not appropriate on the record involved here.

III. THE DOCTRINE OF IMPOSSIBILITY OR IMPRACTICABILITY DOES NOT EXCUSE RHONE-POULENC'S FAILURE TO HONOR ITS EXPRESS AGREEMENT TO GIVE PLAINTIFFS A ONE TIME TRANSFER RIGHT TO THE ORGANIC PLANT SINCE RHONE-POULENC HAD FULL KNOWLEDGE OF THE PROBLEMS INVOLVED.

When Rhone-Poulenc purchased the furnace plant from ICI, it knew the Cross-Bumping Agreement was an express obligation of the furnace plant. Further, it signed the 1988 and 1991 contracts expressly incorporating the Cross-Bumping Agreement which is still in effect in Rhone-Poulenc's

contract. Moreover, it recognized in the memorandum of September 13, 1988, that the Cross-Bumping Agreement was an asset to the employees and further recognized its potential liability if it could not force ICI to comply with the agreement. (Ex. P-4; see also R. 171 at p. 15 - memorandum opinion.)

On page 13 of its brief, Rhone-Poulenc's claims that "[t]he plaintiffs who were laid off made request to ICI that they be permitted to transfer to the organic plant. (TR. 355; Stip ¶ 82.)" What plaintiffs in fact did, was notify Rhone-Poulenc of their intention to exercise their transfer rights under the Cross-Bumping Agreement[10].

The notice of intent forms (Ex. P-43 - R. 160; R. 136, pp. 633, 634; TR. 397-

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[10]Rhone-Poulenc, on pages 12 and 13 of its brief, also claims that the grievance was that plaintiffs "be permitted to transfer to the ICI plant". In fact, the grievance, just like the notice of intent, was directed to Rhone-Poulenc for breach of its obligations under the Cross-Bumping Agreement. A separate grievance was directed to ICI.

400) were given to Rhone-Poulenc and provided as follows:

> The Memorandum of Agreement, dated 09/11/82, between the Company and the Union, states in part:
>
> (Paragraphs 2, 3, 4 and 5 of the Cross-Bumping Agreement are set out verbatim - omitted here.)
>
> I have read the provisions outlined above and elect to do the following:
>
> Check one: ___ I waive my rights to move to the Organic Plant
>
> ___ I hereby exercise my rights to move to the Organic Plant
>
> _____
> Signed Date

The sole basis of the Trial Court's holding on the Rule 50 motion excusing Rhone-Poulenc from its express agreement, was that performance was impossible. The authorities relied upon by defendant involve supervening, unforeseeable events after the making of the

contract. Restatement, Second, Contracts § 261. (Illustrations 1 and 6 to § 261 cited by Rhone-Poulenc, involve unforeseeable events subsequent to the making of the contract.) Florida Power & Light v. Westinghouse Elec. Corp, 826 F.2d 239 (4th Cir. 1987 - unforeseeable subsequent action by third party); Opera Co. of Boston v. Wolf Trap Foundation, 817 F.2d 1094 (4th Cir. 1987 - remanded for factual determination of whether reasonable likelihood contractor should have guarded against the risk).

A different rule is applicable where the condition causing the impossibility is in existence at the time of the making of the contract. In that situation, an essential condition for invoking the impossibility or impracticability doctrine is that the promisor be without fault and the impracticability must arise "because of a fact of which he has no reason to know and the nonexistence of which

is a basic assumption on which the contract is made". Restatement, Second, Contracts § 266. The fact that ICI owned the organic plant was known to Rhone-Poulenc when it purchased the furnace plant and also when it subsequently agreed to the 1988 and 1991 contracts. (R. 171 at 16 - memorandum opinion.)

Moreover, Rhone-Poulenc has the burden of proof on its impossibility defense. McCalden v. California Library Ass'n, 919 F.2d 538, 543 (9th Cir. 1990) (955 F.2d 1214, 1219). At the very least, a jury issue is created and dismissal under Rule 50 is inappropriate.[11]

IV. THE MEMORANDUM AGREEMENT OF OCTOBER 13, 1988, MADE NO CHANGES IN THE CROSS-BUMPING AGREEMENT BUT TO THE EXTENT IT COULD BE CONSTRUED AS

[11] Rhone-Poulenc states in its brief that the order dismissing Stauffer Chemical Company was not appealed. However, Rhone-Poulenc fails to note that the order was not appealed because Rhone-Poulenc expressly agreed on the record to assume the liabilities of Stauffer Chemical Company. Stauffer Chemical Company is clearly liable under the Cross-Bumping Agreement. (TR. 248, 249.)

"CHANGING" OR "CLARIFYING" THE CROSS-BUMPING AGREEMENT, IT IS AMBIGUOUS, REQUIRING A JURY TRIAL.

Rhone-Poulenc claims (p. 11 of its brief) that the October 13, 1988, memorandum "clarified" Rhone-Poulenc's obligations under the Cross-Bumping Agreement. However, the alleged "clarification" claimed by Rhone-Poulenc was expressly rejected in writing by plaintiffs. (TR. 562-568; Exs. P-1, P-2, P-3, P-29, P-14.)

Basically, what Rhone-Poulenc did in the 1988 negotiations was to resort to trickery. It recognized that ICI's tactic of signing the 1988 Collective Bargaining Agreement for the organic plant, including the Cross-Bumping Agreement but denying ICI was bound by it, was a useless procedure. So instead, Rhone-Poulenc informed the plaintiffs that you are only affirming the Cross-Bumping Agreement so we can later explain to our

employees if they are displaced by ICI employees that you refused to change the Cross-Bumping Agreement. After plaintiffs agreed to such affirmance, Rhone-Poulenc argues you did more than affirm, you "clarified" our obligations and in fact this "clarification" is sufficient to mean Rhone-Poulenc has no further liability to plaintiffs. (TR. 562-568; Exs. P-1, P-2, P-3, P-29, P-14.)

The October 13, 1988, agreement should be limited to exactly what Rhone-Poulenc stated it was, a simple affirmance of the Cross-Bumping Agreement. The Trial Court, in its ruling on the summary judgment motions, held the October 13, 1988, memorandum was ambiguous (R. 171, p. 17) and noted plaintiffs had expressly rejected in writing the "clarification" sought by Rhone-Poulenc. (R. 171, p. 17, n. 10.) If any weight is given to

Rhone-Poulenc's claim of "clarification", it at best creates a jury issue.

If a contract is ambiguous, extrinsic evidence is admissible and a jury must decide the controverted positions. Whitten v. Anchor Motor Freight, Inc., 521 F.2d 1335, 1338 (6th Cir. 1975); Scott v. Anchor Motor Freight, Inc., 496 F.2d 276, 280 (6th Cir. 1974.) In Scott, this Court stated as follows, 496 F.2d at 280:

> When a contract is ambiguous, it is for the jury to determine the meaning of its terms, subject to proper instructions and based upon "evidence of the surrounding circumstances and the practical construction of the parties." Tennessee Consolidated Coal Co. v. United Mine Workers of America, 416 F.2d 1192, 1198 (6th Cir. 1969);[2] Goddard v. Foster, 17 Wall. 123, 142, 84 U.S. 123, 21 L.Ed. 589 (U.S. 1872); Local 783 v. General Electric Co., 471 F.2d 751, 757 (6th Cir. 1973).
>
> ...

> When a contract is unambiguous, the judge must state its proper construction to the jury rather than allow it to adopt an erroneous view of the contract. See 4 S. Williston, Law of Contracts, 303 (3rd ed. 1961). "Where, however, the meaning of a writing is uncertain or ambiguous, the question of its meaning should be left to the jury." 4 Williston, 652. Cf. 3 A. Corbin, Contracts 226-27 (1960).

V. **THE RELEASES SIGNED BY CERTAIN PLAINTIFFS CONTAINED A PROVISION EXCEPTING THE CLAIMS UNDER THE CROSS-BUMPING AGREEMENT. BUT IN ANY EVENT, THE EVIDENCE AT LEAST CREATED A FACTUAL ISSUE AS TO WHETHER THOSE CLAIMS WERE EXCEPTED.**

In its argument (Rhone-Poulenc's brief, pp. 29, 30.), Rhone-Poulenc quotes the provisions of the release out of context and omits the most significant portion. Rhone-Poulenc would lead the Court to believe that the only exceptions to the release were unemployment and worker's compensation claims.

Rhone-Poulenc left off its quote "and except as provided under the terms of the memorandum of understanding".

The memorandum of understanding contained the following provision:

> Qualifying for a position at the Organic Plant will make an individual ineligible under this memorandum whereas failure to qualify for a position at the Organic Plant will not make an individual ineligible.

The sworn statements of plaintiffs established that the above clause was inserted at their insistence for the purpose of protecting their transfer rights. (Exs. P-1, P-17 at 48-50, P-18 at 165-170, P-19 at 11-14, 28; TR. 626.) The above quoted provision is meaningless if plaintiffs had fully released their transfer rights.

The most logical construction of the release is that the one time transfer rights of plaintiffs under the Cross-Bumping Agreement was an express exception. If there

is any merit to Rhone-Poulenc's construction, it at best creates a factual issue as controverted by plaintiffs' sworn statements to be tried by the jury.[12]

VI. THE INTERNATIONAL UNION VIOLATED:

(a) ARTICLES VI(2), (3), (5) AND XXIV(11)(E) BY FAILING TO TAKE APPROPRIATE ACTION IN RESPONSE TO THE LETTER OF JUNE 26, 1990, TO INSURE THE ICI CONTRACT HAD TO BE SUBMITTED TO PLAINTIFFS FOR APPROVAL TO THE EXTENT THEIR

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[12]Although the issue is not involved in this appeal, Rhone-Poulenc also erroneously implies (Rhone-Poulenc brief, pp. 12, 13) that plaintiffs failed to exhaust the grievance procedures of the contract. Under the Collective Bargaining Agreement (R. 54 - Ex. 1 to Appendix A, pp. 20, 21), only the Union could carry the grievance past the second step. The record establishes that plaintiffs did all they could to invoke the grievance procedures of the contract. (Exs. P-1, P-48, P-60, P-62; TR. 362, 363, 392, 393, 396, 355, 427-432, 437; R. 162, ¶ 106.) Plaintiffs had taken all required actions to exhaust the grievance procedure under the Rhone-Poulenc Collective Bargaining Agreement. Hines v. Anchor Motor Freight, Inc., 424 U.S. 554, 96 S.Ct. 1048, 47 L.Ed.2d 231 (1976); Vaca v. Sipes, 386 U.S. 171, 87 S.Ct. 903, 17 L.Ed.2d 842 (1967).

RIGHTS WERE AFFECTED;

(b) ARTICLES VI(3) AND (5) AND XXIV(11)(E) BY PERMITTING LOCAL 912 TO AGREE TO THE DELETION OF THE CROSS-BUMPING AGREEMENT FROM THE ICI CONTRACT;

(c) ARTICLES VI(3) AND (5) BY FAILING TO INSURE THAT LOCAL 912 FAIRLY PROCESSED THE GRIEVANCE AGAINST RHONE-POULENC; AND

(d) ITS DUTY OF FAIR REPRESENTATION TO PLAINTIFFS.

The Union, both International and Local, accepted plaintiffs' dues every month after September of 1982, knowing it had a conflict of interest. When the conflict ripened, it refused to honor its contractual obligations under the Union Constitution.

The International Union, obviously recognizing that the General President simply

did not provide the contractual services agreed to, erroneously argues that plaintiffs have somehow abandoned some of the contractual claims under the Union Constitution. The designated sections are interrelated [Articles VI(2), (3), (5) and XXIV(11)(e)] and the complete contract must be considered.

Moreover, the pertinent facts were set out in the pre-trial order governing the trial. (R. 202, pp. 1-5.) The specific constitutional sections were designated in the issues. Plaintiffs' theory in the pre-trial order expressly included the following charge that "the International Union breached its contractual obligations to plaintiffs under Section VI(2), (3) and (5) and XXIV(11)(e) of the IUOE Constitution".

The International Union argues that because plaintiffs stated in argument they were not claiming a trusteeship should have

been imposed (TR. 484)[13], that plaintiffs have waived all other actions the General President could have taken. However, the record clearly establishes that plaintiffs argued to the Court that the General President should have taken numerous other actions short of trusteeship and that he was fully authorized to do so. (TR. 539-542, 549-552, 712-718.)

Under the Union Constitution, the General President had wide and varied powers and he could have taken numerous remedial action up to, and including, the ultimate of trusteeship. (Ex. P-51, pp. 5, 6, 9-11, 22-24.) However, the International Union, with full knowledge, made no effort to take any remedial action.[14]

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[13]The Union Constitution, Article VI(3), uses the phrase "International Supervision" to mean "Trusteeship".

[14]The International Union's reply was non-responsive and nonsensical. It took the position that it could not act until the new ICI contract was approved because there were existing contracts. The very purpose of the inquiry was to determine if Plaintiffs had to participate in and approve the future ICI contract which could affect their rights. Immediately after the ICI contract was approved, the plaintiffs were advised by the

The International Union relies on cases decided before the Supreme Court's decision in Wooddell v. International Bd. of Elec. Workers, 502 U.S. _____, 112 S.Ct. 494, 116 L.Ed.2d 419 (1991). The Wooddell case involved the enforcement of contract rights similar to the contract claims involved herein. Id. 112 S.Ct. at 499.

The International Union primarily relies upon Brenner v. Local 514 United Brotherhood of Carpenters, 927 F.2d 1283 (3rd Cir. 1991). However, Brenner involved claims primarily in the nature of tort. Brenner was decided on April 18, 1991, whereas Wooddell was argued on October 16, 1991, and decided on December 4, 1991, so the Brenner Court did not have the advantage of the Supreme Court's ruling in Wooddell at the time of its decision.

Union that they no longer had any rights.

In a case subsequent to Wooddell, the Ninth Circuit held in Ackley v. Western Conference of Teamsters, 958 F.2d 1463, 1477 (9th Cir. 1992), the members could sue the Union for breach of contract if the Union denied its members the right to vote on a contract. The International Union makes no mention of the Ackley case in its brief.

The International Union basically argues that the Courts are bound by the General President's interpretations of the Union Constitution regardless of how arbitrary such interpretations are. Arbitrary interpretations by an International Union are not binding on the Court. The Court may interfere where the "official's interpretation is not fair or reasonable". Millwright Local No. 1079 v. UBCJA, 878 F.2d 960, 962 (6th Cir. 1989).

Moreover, Millwright and Brenner as noted earlier, were pre-Wooddell decisions.

Under Wooddell, contract principles are applicable. This means that the contractual provisions are construed to be consistent and the provision that the General President shall be "strictly accountable" for the faithful performance of his duties, must have some meaning. Furthermore, if the contract is ambiguous, it is construed against the drafter. Hills Materials Co. v. Rice, 982 F.2d 514, 516 (Fed. Cir. 1992); Tate v. Trialco Scrap, Inc., 745 F.Supp. 458, 467 (M.D. Tenn. 1989), aff'd 908 F.2d 974 (6th Cir. 1990).

Certainly, the Union's interpretation of the contract are not binding on the Court. TCP Industries, Inc. v. Uniroyal, Inc., 661 F.2d 542, 549 (6th Cir. 1981); Local 783 v. General Electric Co., 471 F.2d 751, 756-758 (6th Cir. 1973), cert. den. 414 U.S. 822, 94 S.Ct. 120, 38 L.Ed.2d 55. See also, U.S. Fire Ins. Co. v. Pressed Steel

Tank Co., Inc., 852 F.2d 313, 316 (7th Cir. 1988). A contract does not become ambiguous just because parties do not agree on interpretation. Port of Portland v. Water Quality Ins. Syndicate, 796 F.2d 1188, 1194 (9th Cir. 1986). But if it is ambiguous, parole evidence on intent is admissible and a jury issue is created. Scott v. Anchor Motor Freight, Inc., supra.

The International Union also had a duty of fair representation to plaintiffs. Article VI(5) of the Constitution specifically provides that the General President "shall be strictly accountable and responsible for the faithful performance of his duties and shall administer and enforce every law, rule, regulation and requirement of the Constitution, Ritual and Obligation". Moreover, the International Union's participation and control of the Local Union in this case, are sufficient to establish an

independent duty of fair representation by the International Union. (Ex. P-58, p. 29; Ex. P-59.)[15]

VII. **THE LOCAL UNION ACTED WITH HOSTILITY AND D E L I B E R A T E DISCRIMINATION TOWARDS PLAIN-TIFFS AND NO PLAINTIFF NOR ANY BARGAINING UNIT REPRESENTING PLAINTIFFS EVER AUTHORIZED THE DELETION OF THE CROSS-BUMPING AGREEMENT FROM THE ICI CONTRACT.**

The Local Union argues that the negotiating committee for the 1991 ICI contract was authorized to surrender plaintiffs' rights. This is contradicted by the pleadings as admitted by the Local Union (R. 1 - complaint; R. 23 - answer of Local Union) and by the testimony of plaintiffs. (TR. 352, 569, 571, 572; cf. Ex. P-7.)

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[15]The Collective Bargaining Agreement in the Allen case (Ex. P-59), also as in this case, designated Local Union 912 as the exclusive bargaining agent.

Paragraph 17 of the complaint, as admitted by Local Union 912, stated as follows:

> No member of the bargaining unit from the phosphate plant ever agreed to or authorized the deletion of the September 13, 1982, agreement. The June, 1991 agreement between ICI Americas Inc. and Local Union 912 was never authorized or approved by, nor submitted to, the bargaining unit for the phosphate plant. (Admitted by Local Union 912 in its Answer.)

In Ackley v. Local Union 337, 948 F.2d 267 (6th Cir. 1991); see also 910 F.2d 1295, 1298 (6th Cir. 1990), the plaintiffs were members of the bargaining unit which ratified the compromise agreement negotiated by the Union. They were not members of the negotiating committee because they had not been members for at least two years prior to negotiations. Under the applicable bylaws, this was a valid condition applying to all new members, not just to those plaintiffs. In any

event, those plaintiffs were members of the bargaining unit which authorized the negotiating committee and the Local Union to negotiate the contract and were members of the bargaining unit that ratified the contract. 910 F.2d at 1298.[16]

The Local Union's claim of lack of hostility is also rebutted by the record. The Local Union argues that because they were pleasant and smiled at plaintiffs as they continually represented to plaintiffs that their rights would not be affected by the ICI negotiating unit, no hostility can be established.

Mr. Kincade's letter of June 26, 1990 (Ex. P-7), clearly recognized that plaintiffs' rights would be affected and also clearly recognized that plaintiffs' bargaining

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[16] Ratkosky v. United Transportation Union, 843 F.2d 869 (6th Cir. 1988), and Rakestraw v. United Airlines, Inc., 981 F.2d 1524, 1530 (7th Cir. 1992), are also inapposite. The complaining members were included in the applicable bargaining units established for the negotiating process.

unit could outvote the ICI bargaining unit.

Mr. Carroll testified (TR., pp. 369, 370) as follows:

> Q Mr. Carroll, if you had known ultimately, looking back, if you had known that the ICI employees deleting that from the contract, deleting the cross bumping portion from your contract would have affected your rights what would you have done?
>
> A The first thing that we would have done was wanted a committee, our committee in on those meetings, and to represent our behalf. And if they had ever tried to vote it out, they couldn't because we had 250 members. They had a hundred twenty-five. It just wouldn't have come out of there.
>
> Q The ICI contract of 1991, was that ever submitted to you or the employees at Rhone-Poulenc for approval?
>
> A No, ma'am.

Q Do you think it should have been?

A Yes, ma'am.

...

Q The fact that the ICI and Local 912 bumped or deleted the cross bumping agreement from their '91 contract, do you feel that affected your rights?

A Yes, I do.

Mr. Carroll further testified (TR., pp. 350, 351) as follows:

Q And what did Mr. Kincade continue to tell you?

A He kept telling us that they could not affect us. If they voted it out of their contract, they could not vote ours away.

Plaintiffs could have and would have outvoted the ICI bargaining unit if they had suspected their rights would be destroyed. The Local Union kept them from participating by falsely notifying them their rights would

not be affected. The Union's actions in this case constitute hostility on any standard but it is certainly hostility where a trustee engages in such activities.[17]

Moreover, the Local Union failed to inform plaintiffs of the settlement offer received from ICI. (Exs. P-1, P-14, P-19 at 72-78, P-6.) And finally, the Union, both International and Local, discontinued the grievance against Rhone-Poulenc because of its duty of fair representation "with its members at ICI". (TR. 458-467; Exs. P-10, P-44; see also R. 171 at 30, 31 - memorandum opinion.) Brotherhood of Locomotive Firemen, etc. V. Mitchell, 190 F.2d 308 (5th Cir. 1951 - bargaining agent for all employees favored

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[17]The Local Union, like the International Union, also erroneously argues that plaintiffs have abandoned a duty of fair representation claim. Plaintiffs have stated the facts and briefed the legal issues. There has been no abandonment of any claim. ICI also erroneously argues plaintiffs have abandoned certain inducing breach of contract claims against it. ICI just ignores the numerous statements by plaintiffs in their brief that ICI induced the Local Union to breach its contractual and trust obligations to plaintiffs.

members over nonmembers in conflict of interest situation).

VIII. **THE PROFFERED EXHIBIT (EX. P-4) CONTAINED RELEVANT STATEMENTS AND THE AUTHOR WAS IDENTIFIED AND ACCORDINGLY, BASED ON STIPULATED AUTHENTICITY, THE DOCUMENT SHOULD HAVE BEEN ADMITTED.**

The words "authentication" and "identification" describe the same process. At p. 41 of its brief, Rhone-Poulenc quotes from Professor Moore to the effect that "authentication or identification" is a two step process of showing the document contains a relevant statement and also identifying the author. Since authenticity was stipulated (R. 202 - second pre-trial order), it was agreed that this process had been completely met.

Moreover, the document, on its face, contains relevant statements and

identifies the author. Furthermore, the witness specifically identified the author and his relationship to Rhone-Poulenc and further testified to the negotiating proceedings contemplated by the proffered exhibit. (TR. 562, 577, 578, 628-634, 563-567.) To require a witness with specific personal knowledge of the document to testify as a condition of admissibility after authenticity has been stipulated, makes the stipulation meaningless. 7 Wigmore, Evidence §§ 2128(3), 2130-2132. (After authentication, "counsel" may read or submit document to jury.)

CONCLUSION

For the reasons stated above and in the main brief for the Appellants, the final decision of the United States District Court should be reversed.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that two copies of the foregoing have been mailed to Cary Schwimmer, Esq., Young & Perl, P.C., 2380 One Commerce Square, Memphis, Tennessee 38103, William N. Ozier, Esq., Bass, Berry & Sims, 2700 First American Center, Nashville, Tennessee 37238, C. Dewey Branstetter, Jr., Esq., Branstetter, Kilgore, Stranch & Jennings, 200 Church Street, Nashville, Tennessee 37201 and to George E. Barrett, Esq., Barrett, Johnston & Parsley, 217 Second Avenue North, Nashville, Tennessee 37201-1601, this 24th day of June, 1994.

/s Frank Steiner
Frank Steiner

91053B3

OMISSIONS

(LOGO)

July 22, 1991

ICI Specialties
P.O. Box 152
Mt. Pleasant
Tennessee 38474

Telephone (615) 379-3257
Fax (615) 379-7124

W. B. Hendry

Rhone-Poulenc

P O Box 472

Mt. Pleasant, Tn 38474

Dear Mr. Hendry:

I hereby return to you the document entitled "Notice of Intent" signed by Mike Lindsey, which you sent to Bob Stringer by letter dated July 15, 1991. The document you sent has no application to ICI Americas Inc. No current or former employee of Rhone-Poulenc has "rights to move to" ICI Specialties, Mt. Pleasant plant.

Any persons interested in employment with ICI, including current or former employees of Rhone-Poulenc, are free to fill out employment applications with our company. Applications for persons who are or were employed with Rhone-Poulenc will be considered on the same basis as applications submitted by any other person.

Sincerely,

/s Stanley M. Straker
Stanley M. Straker
Plant Manager

cc: C. Boyd
B. Francis

Supreme Court, U.S.
FILED
DEC 28 1995
OFFICE OF THE CLERK

No. 95-841

In The

Supreme Court of the United States

October Term, 1995

ALBERT AKINS, ET AL.,

Petitioners,

vs.

ZENECA, INC.; RHONE-POULENC, INC.; RHONE-POULENC BASIC CHEMICALS COMPANY; STAUFFER CHEMICAL COMPANY; INTERNATIONAL UNION OF OPERATING ENGINEERS, AFL-CIO; LOCAL 912, INTERNATIONAL UNION OF OPERATING ENGINEERS, AFL-CIO,

Respondents.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Sixth Circuit

BRIEF OF RESPONDENTS RHONE-POULENC, INC. AND RHONE-POULENC BASIC CHEMICALS COMPANY IN OPPOSITION

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QUESTIONS PRESENTED

Although the petitioners state four pages of Questions Presented, the respondents, Rhone-Poulenc, Inc. and Rhone-Poulenc Basic Chemicals Co. (the "Rhone-Poulenc Respondents"), assert that the only questions properly presented by the Petition for Certiorari are:

1. Whether the Court of Appeals properly ruled that the respondents, International Union of Operating Engineers, AFL-CIO, and Local 912, International Union of Operating Engineers, AFL-CIO, did not breach their duty of fair representation to the petitioners.

2. Whether the Court of Appeals properly concluded that there was no factual basis for plaintiff's conspiracy claims.

3. Whether the Court of Appeals properly concluded that the release signed by certain of the petitioners precluded their claims against the Rhone-Poulenc Respondents.

4. Whether the Court of Appeals correctly concluded that there was no breach of the International Union of Operating Engineers' Constitution.[1]

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[1] The Rhone-Poulenc Respondents do not respond to this issue since the disposition of this issue does not bear on the liability of these respondents.

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BRIEF OF RESPONDENTS, RHONE-POULENC, INC. AND RHONE-POULENC BASIC CHEMICALS CO. IN OPPOSITION

OPINIONS BELOW

Petitioners have correctly stated the status of the opinions of the United States District Court for the Middle District of Tennessee and the United States Court of Appeals for the Sixth Circuit, both of which are included in the Appendix (A-128; A-1).

JURISDICTION

The Rhone-Poulenc respondents admit the basis upon which the petitioners seek certiorari from this Court but deny that this case presents issues over which this Court should assert jurisdiction.

STATUTE INVOLVED

Petitioners' primary claim is based on Section 301 of the Labor-Management Relations Act, as amended, 29 U.S.C. § 185. Petitioners' other claims are based on common law theories under the law of the State of Tennessee.

STATEMENT OF THE CASE

The Rhone-Poulenc Respondents accept Petitioner's statement of the essential facts regarding the historical

background upon which this case arose. The Respondents dispute Petitioners' reliance on an internal memorandum written by an employee of the respondent, Rhone-Poulenc Basic Chemicals Co., on September 13, 1988 (Petition at pp. 5-6) since that document was not admitted into evidence by the District Court and the Court of Appeals held that the District Court's decision not to admit that document into evidence was not error.[2] (A-28-9).

The Rhone-Poulenc Respondents also dispute the petitioners' characterization of the declaratory judgment action brought by respondent, Local 912 of the International Union of Operating Engineers ("Respondent Local Union") as a "friendly lawsuit" or any reliance on that action to support their conspiracy claim under state law. (Petition at p. 8). The parties had engaged in extensive written discovery in that proceeding and, in fact, had scheduled discovery depositions for the day following the date on which members of Respondent Local 912 employed by the defendant, Zeneca, Inc. (formerly ICI Americas, Inc.), had voted to ratify a new collective bargaining agreement which eliminated the cross-bumping agreement from that company's collective bargaining agreement. The Rhone-Poulenc Respondents submit that no basis exists for finding a "conspiracy" among the

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[2] Petitioners' characterization of that document is itself erroneous. The memorandum does not constitute an "admission" of liability but recognizes only the potential for claims from disappointed employees which is, in fact, what resulted in this action. The memorandum was written by a representative of the Respondent, Rhone-Poulenc Basic Chemicals Co., who was not an attorney and certainly did not constitute a "legal" analysis of the respondents' obligations to any of its employees.

Respondents in this case based on their actions in that proceeding.

Grievances were filed under the terms of the collective bargaining agreement between the Respondent, Rhone-Poulenc Basic Chemicals Co. and Respondent Local 912 by employees laid off from the Rhone-Poulenc furnace plant in August of 1991. In response to those grievances, Rhone-Poulenc provided the forms for its laid-off employees to assert their claims to transfer to the Zeneca organic plant. Rhone-Poulenc did not, at any time, refuse or fail to process any grievance. No request was ever made by Local 912 that any grievance be referred to final and binding arbitration under the terms of the collective bargaining agreement.

The Rhone-Poulenc Respondents also dispute the assertions that petitioners did not "intend" to surrender transfer rights when they executed the release in order to receive severance pay. The District Court correctly concluded that the release language included a release of the claims asserted by petitioners in this proceeding and that decision was affirmed by the Sixth Circuit.

ARGUMENT

The issues asserted by petitioners in this case do not raise a question where a United States Court of Appeals has rendered a decision in conflict with the decision of another United States Court of Appeals on the same matter, or has decided a federal question in a way in conflict with a state court of last resort, or has so far departed from the accepted and usual course of judicial

proceedings, or sanctioned such a departure by a lower court as to call for an exercise of this Court's power of supervision. Supreme Court Rule 10.1(a). Similarly, the issues raised by petitioners do not involve a decision by a United States Court of Appeals involving an important question of federal law which has not been, but should be, settled by this Court, nor did the court below decide a federal question in a way that conflicts with applicable decisions of this Court. The Petition for Certiorari should be denied.

A. The Court of Appeals correctly concluded that there was no breach of duty of fair representation by the respondents, International or Local Unions.

It is elementary that in order to sustain their claims against the respondents under Section 301 of the Labor-Management Relations Act, petitioners had to prove that there was both a breach of the duty of fair representation by the labor organizations who were parties to the collective bargaining agreement at issue and that there was a breach of the terms of those agreements by the Respondent employers. *United Parcel Service, Inc. v. Mitchell*, 451 U.S. 56, 66-7, 101 S.Ct. 1559, 67 L.Ed.2d 732 (1981); *Vaca v. Sipes*, 386 U.S. 171, 87 S.Ct. 903, 17 L.Ed.2d 842 (1967); *Humphrey v. Moore*, 375 U.S. 335, 342, 84 S.Ct. 363, 11 L.Ed.2d 370, 377 (1964). Failure to prove either element required dismissal of the plaintiff's claims. (*Id*). The District Court concluded that plaintiffs had failed to prove either element of their claim. (Appendix, A-145 through A-153). The Court of Appeals affirmed the dismissal of

petitioner's claims also finding no breach of the duty of fair representation. (A-15-16).

Petitioners' reliance on *Steele v. L&N Railroad Co.*, 323 U.S. 192, 65 S.Ct. 226, 89 L.Ed. 173 (1944) is misplaced. There is no evidence in this case that the Respondent Local Union acted on the basis of racial bias or any other improper motive. The Local Union was placed between the proverbial "rock and hard place" in trying to represent the interests of two groups of its members whose interests were diametrically opposed. A "wide range of reasonableness must be allowed a statutory bargaining representative." *Air Line Pilots Ass'n v. O'Neill*, 499 U.S. 65, 75, 111 S.Ct. 1127, 113 L.Ed.2d 51, 63 (1991); *Ford Motor Co. v. Huffman*, 345 U.S. 330, 338, 73 S.Ct. 681, 97 L.Ed. 1048 (1953). A union breaches its duty of fair representation only if its actions are arbitrary, discriminatory or in bad faith, and a union's actions are arbitrary only if, in light of the factual and legal landscape at the time of the union's actions, its behavior is so far outside of a wide range of reasonableness as to be irrational. *O'Neill*, 499 U.S. at 67.

Petitioner's reliance on *Lewis v. Tuscan Dairy Farms, Inc.*, 25 F.3d 1138 (2d Cir. 1994) and *Aquinaga v. United Food & Commercial Workers*, 993 F.2d 1463 (10th Cir. 1993), *cert. denied*, ___ U.S. ___, 114 S.Ct. 880; 127 L.Ed.2d 75 (1994) is also misplaced. In *Lewis*, the Court found that the Union had breached its duty of fair representation because of a secret agreement entered into between the Local Union President and the employer not to enforce a specific requirement for dovetailing seniority lists of companies acquired by the employer. The court concluded that the Union deliberately refused to process the

employees' meritorious grievance over the dovetailing provision. There is no evidence whatsoever in the instant case of any "secret" agreement by any officer of the Local Union with the Respondent employers nor of any arbitrary refusal of the Union to process a "meritorious" grievance.

Similarly, in *Aquinaga* the Union made a secret agreement with the employer allowing the company to shut down a plant whose employees were represented by the Union and reopen it as a non-union facility. The court concluded that the union " . . . not only failed to protect the plaintiffs' interest, it bartered away plaintiffs' means of protecting themselves and left the plaintiffs without representation." 993 F.2d at 1471. There are no facts in the instant case even close to those in *Aquinaga*.

There was no breach of the duty of fair representation by Local 912 so the Petitioner's § 301 action was properly dismissed under well-established legal precedent.

B. The District Court correctly held that performance of any obligation of the Rhone-Poulenc Respondents which may have existed under the cross-bumping agreement was excused by the doctrine of impossibility.

Although the Court of Appeals disagreed with the District Court's holding that the Rhone-Poulenc Respondents were excused from performing any obligation which may have existed under the cross-bumping agreement on the basis of the doctrine of impossibility or impracticability, the Rhone-Poulenc Respondents submit

that that decision was erroneous and that the District Court ruled correctly on that issue. Circuit Judge Contie, who dissented from the majority opinion, agreed with the District Court. (A-30).

The courts and commentators alike have recognized that a party's duty to perform a contract may be excused when such performance is impracticable. The doctrine of impracticability is an absolute defense to a breach of contract action and relieves the breaching party from any liability for damages. *See Restatement (Second) of Contracts*, § 261, illustrations 1 & 6. As set forth under the *Restatement (Second) of Contracts*,

> Where, after a contract is made, a party's performance is made impracticable without his fault by the occurrence of an event the nonoccurrence of which was a basic assumption on which the contract was made, his duty to render that performance is discharged, unless the language or circumstances indicate the contrary.
>
> *Restatement (Second) of Contracts*, § 261 (1981).

Although this rule is sometimes phrased in terms of "impossibility," a party's duty is discharged even though performance is not absolutely impossible. *See Restatement (Second) of Contracts*, § 261, Comment d (1981).

The doctrine of impracticability does not depend on, nor is it limited in, its application by the language of the contract. *Florida Power & Light Co. v. Westinghouse Electric Corp.*, 826 F.2d 239, 262 (4th Cir. 1987); *see also Restatement (Second) of Contracts*, Introductory Note on Impracticability of Performance (1981). The doctrine is a "defense to an action for breach of contract" and is "essentially an

equitable defense" that rests solely "on the unfairness and unreasonableness of giving [the contract] the absolute force which its words clearly state." *Florida Power & Light*, 826 F.2d at 263 (quoting 18 *Williston on Contracts*, § 1931, p. 6).

When ownership of the furnace and organic plants was separated into two unrelated corporations, it became legally impossible for Rhone-Poulenc to force Zeneca (or ICI) to accept employees laid off from the furnace plant as its employees. Whatever obligation ICI may have had to accept the transfer of Rhone-Poulenc employees ended in June, 1991, when the 1982 memorandum agreement was removed from the collective bargaining agreement between ICI and Local 912. Once the furnace plant and organic plant were owned by completely separate corporations, the basic assumption underlying the memorandum agreement was destroyed and Rhone-Poulenc was discharged from any obligation thereunder. *See Eastern Air Lines, Inc. v. McDonnell-Douglas Corp.*, 532 F.2d 957, 991 (5th Cir. 1976) (the impracticability doctrine arises as a defense to breach of contract when "the circumstances causing the breach has made performance so vitally different from what was anticipated that the contract cannot reasonably be thought to govern"); *Green v. McGrath*, 662 F. Supp. 337 (E.D. Ky. 1986) (owner of a stallion who contracted with the owner of a thoroughbred mare to breed the horse was not liable for breach of contract after the stallion was kidnapped); *Waldinger Corp. v. CRS Group Engineers*, 775 F.2d 781 (7th Cir. 1985).

The majority of the Court of Appeals panel found that the "impossibility" doctrine did not apply since Rhone-Poulenc "knew" it could not perform under the

cross bumping agreement in 1988 when it negotiated a new contract with Local 912 " . . . in the sense that R-P could not force ICIA, a separate corporation with which it had no contractual ties, to abide by the cross bumping agreement." (A-14-15). However, "foreseeability" is not an issue in the applicability of the impossibility defense. *See, Restatement (Second) of Contracts*, Section 261, comment B at (c) (1981). Certainly, in 1988 when Rhone-Poulenc renegotiated its contract with Local 912, there is no way that it could have "foreseen" that ICI would agree with Local 912 to remove the cross bumping agreement from its contract with the union.

In short, Rhone-Poulenc had no obligation, or ability, to force Zeneca, or ICI, to accept its laid off employees. Its obligation under the cross bumping agreement was only to accept the transfer of employees laid off by ICI from the organic plant and permit its own employees to seek employment at the ICI plant if laid off from the furnace plant. Rhone-Poulenc did all that it was legally obligated or entitled to do.

Rhone-Poulenc assisted its employees who had been laid off to present their request to transfer to the ICI organic plant. Rhone-Poulenc did not, at any time, refuse to process any grievance filed by any of its laid off employees or the Local Union, but responded only that it could not compel ICI to accept the transfer of its employees once the cross bumping agreement had been eliminated from that employer's contract. The grievances filed by Rhone-Poulenc employees under the contract between Rhone-Poulenc and Local 912 were subsequently

withdrawn by the union and never advanced to arbitration.[3]

In short, there was no breach of contract by Rhone-Poulenc so that the District Court properly dismissed Petitioners' § 301 action and the Court of Appeals correctly affirmed that dismissal.

C. The Court of Appeals correctly ruled that there was no factual basis for Plaintiffs' conspiracy claim.

Tennessee courts recognize both a common law and statutory cause of action for civil conspiracy. Both require proof of a "combination between two or more persons to accomplish by concert an unlawful purpose or to accomplish a purpose, not in itself unlawful, by unlawful means." *Hardin v. Caldwell*, 695 S.W.2d 189, 191 (Tenn. Ct. App. 1985). Both require plaintiffs to first prove the existence of an underlying tort. *Forrest v. Stockstill*, 869 S.W.2d 328, 330 (Tenn. 1994). Failure to do so precludes recovery for civil conspiracy. *See, id.* ("If the [underlying] claim fails, then the claim for conspiracy must also fail, for '[i]t cannot be that a conspiracy to do a thing is actionable where the thing itself would not be.' " (citing *Felts v. Paradise*, 158 S.W.2d 727, 729 (Tenn. 1942)).

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[3] The Union obviously recognized the futility of pursuing those grievances to arbitration. There was no way for an arbitrator, deciding a grievance between Local 912 and Rhone-Poulenc, to require ICI to accept the transfer of Rhone-Poulenc employees.

To this end, petitioners contended that all of the respondents tortiously interfered with their asserted rights under the contract between ICI and Local 912 or between Rhone-Poulenc and Local 912. Petitioners failed to establish that: (1) a legal contract existed; (2) the wrongdoer knew of the contract; (3) the wrongdoer intended to induce breach; (4) the wrongdoer acted with malice; (5) a breach occurred; (6) the wrongdoer caused the breach; and (7) damages resulted. *Oak Ridge Precision Indus., Inc. v. First Tenn. Bank Nat'l Ass'n*, 835 S.W.2d 25, 29 (Tenn. Ct. App. 1992). A party cannot be held liable under this tort for interfering with a contract to which it was a party. *Koehler v. Cummings*, 380 F. Supp. 1294, 1313 (M.D. Tenn. 1971).

Petitioners failed to support their claim of tortious interference with contract, since Local 912 and Rhone-Poulenc were parties to one contract at issue and Local 912 and ICI were parties to the other. There was no evidence that either employer interfered with the other's contract.[4] Petitioners failed to prove that any defendant acted with actual malice. *See Testerman v. Tragesser*, 789 S.W.2d 553, 556-57 (Tenn. App. 1989) (failure to prove actual malice precludes a claim for tortious interference with contract). Similarly, there was no tortious interference with any contract by ICI when it agreed during the

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[4] Indeed, Rhone-Poulenc had no interest in seeing the cross bumping agreement removed from the ICI contract. If ICI had accepted the laid off Rhone-Poulenc employees under that agreement, Rhone-Poulenc would have avoided the expense of paying out several hundred thousand dollars in severance pay.

course of collective bargaining with its own employees to remove the cross bumping agreement.

As petitioners failed to establish their tort, an underlying claim for civil conspiracy also fails as a matter of law. The district court properly dismissed petitioner's state law conspiracy claims and the Court of Appeals correctly affirmed that dismissal. No issue is presented under this theory for this Court's disposition.

D. The Court of Appeals correctly held that the releases executed by certain of the Petitioners preclude their maintenance of this action.

The releases executed by the Petitioners stated:

> I hereby release the company from *any and all* pending and future obligations and liabilities to me arising out of employment with the company, except for any unemployment compensation or workers' compensation claims that I may make except as provided under the terms of the Memorandum of Understanding. (emphasis added).

The district court dismissed the claims against Rhone-Poulenc asserted by those plaintiffs who signed that release and received severance pay. The Court of Appeals affirmed that dismissal finding that the language of the release is clear and unambiguous, specifically informed the plaintiffs that they were waiving *any and all* claims against Rhone-Poulenc except for workers' compensation or unemployment compensation claims, and were supported by sufficient consideration in the form of severance pay. (A-21-2). The Court of Appeals also found

no basis for finding unconscionability or overreaching by Rhone-Poulenc. Petitioners cite no authority as any basis for the reversal of that decision.

No issue is presented under this theory for disposition by this Court.

CONCLUSION

There is no basis for the assertion of jurisdiction by this Court over the Petitioners' claims. The Petition for Certiorari should be denied.[5]

Respectfully submitted,

WILLIAM N. OZIER
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[5] The Rhone-Poulenc Respondents do not address Petitioners' claims against Zeneca, Inc. or the International Union since that those claims do not involve the interests of these respondents.

Supreme Court, U.S.
FILED
JAN 29 1996
CLERK

No. 95-841

IN THE
Supreme Court of the United States
OCTOBER TERM, 1995

ALBERT AKINS, *et al.*,
Petitioners,
v.
ZENECA, INC.; RHONE-POULENC, INC.; RHONE-POULENC BASIC CHEMICALS COMPANY; STAUFFER CHEMICAL COMPANY; INTERNATIONAL UNION OF OPERATING ENGINEERS, AFL-CIO; LOCAL 912, INTERNATIONAL UNION OF OPERATING ENGINEERS, AFL-CIO,
Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

BRIEF OF RESPONDENT INTERNATIONAL UNION OF OPERATING ENGINEERS IN OPPOSITION

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BRIEF OF RESPONDENT INTERNATIONAL UNION OF OPERATING ENGINEERS IN OPPOSITION

INTRODUCTORY NOTE

The Petitioners have, in scattershot fashion, raised a multiplicity of issues in their petition for *certiorari*. The Defendant/Respondent International Union of Operating

Engineers (hereinafter "International Union") will respond here to those questions which may involve the International Union and will not address itself to those questions which concern only the other Respondents.

STATEMENT OF THE CASE

The International Union briefly restates the relevant facts here. This case arises out of a plant closure. Stauffer Chemical Company formerly operated two separate production facilities in Mt. Pleasant, Tennessee known as the organic plant and the furnace plant. (A-33). At all times material hereto, the union which was the certified collective bargaining representative for the employees of both plants was Local 912, International Union of Operating Engineers (hereinafter "Local 912"), not the International Union. (*Id.*). Prior to 1982, there was a single collective bargaining agreement covering the organic and furnace plants. (*Id.*). In 1982, Stauffer and Local 912 agreed to separate the organic and furnace plants into two separate bargaining units, one for each plant, and to negotiate separate agreements for each plant. (A-34).

At the time the parties agreed to separate the bargaining units, Stauffer and Local 912 entered into a memorandum of agreement which has come to be known as the September 13, 1982 Memorandum. (*Id.*, at fn. 3). The September 13, 1982 Memorandum was incorporated by reference into the 1982 collective bargaining agreements between the parties. (A-36). It provided that, in the event of a reduction in force at either facility, the employees of that facility could exercise their seniority to displace less senior employees at the other facility. (A-34, at fn. 2). The International Union was not a party to any of the collective bargaining agreements between Stauffer and Local 912 nor was it a party to the September 13, 1982 Memorandum. (A-34–A-37).

In 1985, Stauffer and Local 912 renewed both agreements for a three year period. (A-37). ICI Americas

(hereinafter "ICI") purchased Stauffer in 1987 and continued to operate both plants. (*Id.*). ICI assumed the obligations under the 1985 collective bargaining agreements for both facilities. (A-37). Later in 1987, ICI sold the furnace plant to Rhone-Poulenc (hereinafter "R-P"). (*Id.*). In 1988, both ICI and R-P entered into new, separate, collective bargaining agreements with Local 912 for a three year period. (A-40). Again, the International Union was not a party to these agreements. (*Id.*).

In June of 1990, R-P announced it was intending to close the furnace plant. (A-41). Shortly thereafter, the chief officer for Local 912, Business Manager James Kincade, wrote the General President of the International Union, Frank Hanley. (A-42). In his letter, Mr. Kincade described the 1982 Memorandum, indicated that one of the plants was scheduled to close, and asked whether, if the employees at one of the plants proposed to do away with the Memorandum, which employees would be entitled to vote on such a proposal under the provisions of Article XXIV, Subdivision 11, Section (e) of the International Union Constitution.[1] (A-236). In writing this letter, Mr. Kincade was requesting that General President Hanley exercise his authority, under Article VI,

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[1] Article XXIV, Subdivision 11, Section (e) provides, in pertinent part:

> Proposed collective bargaining agreements and modifications thereof may be negotiated for Local Unions by the Business Manager, by a committee, by the Local Executive Board, or by the Business Representative. Such agreements and modifications thereof shall not be executed until they have been presented at the next membership meeting following the negotiation of the proposed agreement and have been approved by the membership affected, provided, however, that a Local Union may delegate to its Local Executive Board or to its bargaining committee authority to approve such agreements and modifications without such submission of the same to vote of its membership.

(A-23 - A-24).

Section 2 of the International Union Constitution, "to interpret the provisions of the Constitution and decide questions of law arising thereunder." [2] (*Id.*).

By its terms, Article XXIV, Subdivision 11, Section (e) applies only to "proposed collective bargaining agreements and modifications thereof." (A-366). In his letter, Mr. Kincade did not mention any actual modification to the 1982 Memorandum which had been proposed by either the relevant employer or by Local 912, and the rights of all concerned were governed by the existing Memorandum. (A-326). Under these circumstances, Mr. Hanley treated the question as a hypothetical one. By letter dated July 27, 1990, he replied to Mr. Kincade that the union members' rights were already governed by the cross-bumping agreement and Article XXIV, Subdivision 11, Section (e), which applied only to "proposed" modifications of collective bargaining agreements, was inapplicable. (A-248).[3]

On June 11, 1991, ICI and Local 912 entered into a new collective bargaining agreement for the organic plant which deleted all references to the September 13, 1982 Memorandum of Agreement. (A-44). Subsequently, two of the Petitioners, Terrance Nevette and Waylon Carroll, transmitted by facsimile a letter with exhibits to Mr.

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[2] With respect to this authority to interpret the Constitution, as well as with respect to other powers and duties of the General President, Article VI, Section 5 of the International Union Constitution vests the International Union General President with "unlimited discretion in the application and administration of his powers and duties."

[3] The question of membership ratification was irrelevant in any event, because the authority to approve modifications to the relevant agreements had been delegated by the Local Union to the bargaining committees of each plant, pursuant to the proviso contained in Article XXIV, Subdivision 11, Section (e) which allows the Local to delegate the approval function to the Local Executive Board or bargaining committee in lieu of membership ratification. (A-24 - A-25).

Hanley. (A-45–A-46). The letter described the situation involving ICI, R-P, Local 912, and the memorandum of agreement and accused Local 912 of a conflict of interest. (A-273). It also attached a copy of a second stage grievance against the two employers. (*Id.*).

Mr. Hanley forwarded the letter to Mr. Kincade requesting a reply. After receiving Mr. Kincade's response, he replied to Mr. Nevette and Mr. Carroll by letter dated August 5, 1991. (A-291). He stated that since the International Union was not a party to any of the collective bargaining agreements mentioned by Mr. Nevette and Mr. Carroll, the International Union was without authority to alter or amend the terms of such agreements or intervene in the matter described in their letter. (*Id.*).

In November 1991, sixty-eight employees of R-P filed suit against the Defendant/Respondents. They alleged *inter alia*, violations of § 301 of the Labor Management Relations Act, 29 U.S.C. § 185, including breaches of the duty of fair representation and of the International Union's Constitution. The United States District Court for the Middle District of Tennessee dismissed certain of these claims in response to Defendants' Motions for Summary Judgment, and the rest of the claims in response to the Defendants' Motion for a Judgment as a Matter of Law pursuant to Federal Rule of Civil Procedure 50(b). As to the International Union, the District Court, on summary judgment, found that the International Union was not the Plaintiffs' exclusive bargaining representative and therefore did not owe any of the Plaintiffs a duty of fair representation. The District Court allowed the constitutional claims against the International Union to proceed to trial. After the close of Plaintiffs' case, the District Court held, in response to the Rule 50(b) motion, that the International Union did not breach its Constitution. On appeal, the Sixth Circuit affirmed the District Court's holdings concerning the International Union in all respects. Specifically, with respect to the questions concerning interpretation of the International Union's Constitu-

tion, the court of appeals held that the responses of the International Union's General President contained in his July 27, 1990 and August 5, 1991 letters were "not unreasonable." (A-26 and A-27).

ARGUMENT

To the extent their arguments can be discerned, the Petitioners appear to raise two issues concerning the International Union: 1) the Sixth Circuit incorrectly found that the International Union had not breached its Constitution; and 2) the Sixth Circuit incorrectly failed to find the International Union automatically responsible for the actions of its autonomous Local 912. The arguments made by the Petitioners in support of these contentions are without merit. As to both of these matters, the court of appeals' decision is entirely correct and entirely consistent with this Court's decisions. The *certiorari* petition should therefore be denied.

I. THE SIXTH CIRCUIT CORRECTLY DETERMINED THAT THE INTERNATIONAL UNION DID NOT BREACH ITS CONSTITUTION.

A. At page 22 of their Petition, Petitioners claim that the Sixth Circuit's determination that the International Union did not breach its Constitution is in conflict with this Court's decision in *Wooddell v. International Bhd. of Elec. Workers*, 502 U.S. 93 (1991) and would render that decision meaningless. This contention is clearly incorrect. In *Wooddell*, this Court held that § 301 creates a federal cause of action under which union members may sue their union for breach of the union's constitution, stating:

> Members of a collective-bargaining unit are often the beneficiaries of such interunion contracts [union constitutions], and when they are, they likewise may bring suit on these contracts under § 301. [*Id.*, at 101.]

Here, contrary to the Petitioners' contentions, the court of appeals did not hold that § 301 did not allow the Petitioners to sue the International Union to enforce the union's constitution. Rather, the court of appeals applied *Wooddell*, stating, with respect to the claims for breach of the union's constitution, that:

> . . . [W]e agree that plaintiffs, as third-party beneficiaries of the IUOE Constitution, may sue to enforce the provisions of that constitution, *see Wooddell v. International Bhd. of Elec. Workers*, 502 U.S. 93, 98-99 (1991) . . . [A-23]

However, the court went on to determine that, *on the merits*, the International Union's actions did not breach any of the constitutional provisions which Petitioners alleged were breached. Thus, there is absolutely no conflict between *Wooddell* and the court of appeals' decision. Therefore, the *certiorari* petition should be denied.

B. Examining the specifics of the constitutional claims advanced by the Petitioners only reinforces the above-stated conclusion. Petitioners contend that the International Union breached Article VI, Sections 2, 3, and 5 of its Constitution. Article VI of the Constitution generally articulates the powers and duties of the International Union's chief elected officer, its General President: Section 2 provides that the General President "shall also be empowered to interpret the provisions of the Constitution and decide questions of law arising thereunder"; Section 3 gives the General President the authority, under certain specifically defined circumstances and pursuant to a statutorily mandated procedure, to invoke and administer "International Supervision" (the Constitution's term for trusteeship) and certain other peremptory powers; and Section 5 provides, *inter alia*, that the General President shall be strictly accountable and responsible for the faithful performance of his duties. As the Sixth Circuit correctly held, the International Union breached none of these provisions in this case.

Any review of Petitioners' constitutional contentions must start, as the Sixth Circuit's did, with the premise that the courts must defer to a union's own interpretation of its constitution so long as the interpretation is not unreasonable. *Maher v. International Bhd. of Elec. Workers*, 15 F.3d 711, 714 (7th Cir. 1994); *Millwright Local No. 1079 v. UBCJA*, 878 F.2d 960, 962 (6th Cir. 1989). Here, as the Sixth Circuit correctly determined, the International Union's constitutional interpretations were "not unreasonable."

Specifically, as to the claim for breach of Article VI, Section 2, it was not unreasonable for the General President, pursuant to his discretionary authority to interpret the Constitution, to inform Local 912 in his July 27, 1990 letter that Article XXIV, Subdivision 11, Section (e) did not apply to the situation presented by Local 912's Business Manager because there was no "proposed agreement or modification thereof" under consideration. Moreover, to the extent Petitioners' claim is that General President Hanley's letter was nonresponsive, there can be no contention that his alleged nonresponsiveness constituted a breach, for, as the Sixth Circuit held, nothing in Section 2 "obligated Hanley to interpret the constitution on demand." (A-26).

As to the claim for breach of Article VI, Section 3, Petitioners abandoned this claim at trial. (A-27). Although Petitioners try to revive it here, see footnote 8 on page 23 of their Petition, a *certiorari* petition is not the place to resurrect abandoned claims *ex post facto*. Moreover, as the Sixth Circuit correctly determined, even if the claim was not abandoned, the General President's response to the letter from two of the Petitioners was not unreasonable. The General President's decision to decline to exercise his authority to place a Local Union under trusteeship and to decline to insert the International Union into the dispute between Local 912 and the Petitioners was in fact eminently reasonable. Petitioners ad-

vance no basis upon which this Court could base a reversal of that judgment. Here, the language in Article VI, Section 3 merely gives the General President the authority, but not the obligation, to impose International Supervision. Thus, there was not and cannot be a breach of that provision when the General President declines to exercise that discretionary authority. See *Brenner v. Local 514, United Brotherhood of Carpenters*, 927 F.2d 1283, 1292 (3rd Cir. 1991) (retention of regulatory and supervisory powers gives an international union a discretionary right rather than an obligation to intervene in local union affairs; before an obligation to intervene can be imposed the obligation must be contained in explicit constitutional language).

As to the claim for breach of Article VI, Section 5 of the Constitution, the Sixth Circuit found that the Petitioners had also waived this issue by not presenting any evidence to support it during the trial. (A-27, at fn. 8). Again, Petitioners attempt here to resurrect the abandoned claim and again such an attempt is clearly inappropriate.

Moreover, assuming *arguendo* that Petitioners have not waived this issue, it is completely unclear which aspect of Article VI, Section 5 Petitioners claim has been breached. Apparently, Petitioners argue that the provision of Article VI, Section 5 which mandates that the General President shall be strictly accountable and responsible for the faithful performance of his duties imposes a duty of fair representation upon the International Union towards Petitioners. However, as this Court has determined, see *Chauffeurs, Teamsters and Helpers Local 391 v. Terry*, 494 U.S. 558, 563 (1990), the duty of fair representation is a statutory duty which arises from the union's statutory exclusive authority under the National Labor Relations Act, 29 U.S.C. § 159(a), to represent all employees in a bargaining unit. It is not a contractual duty which can arise from the union's constitution. See *Erkins v. United Steelworkers of America*, 723

F.2d 837, 840 (11th Cir. 1984), *cert. denied*, 467 U.S. 1243 (1984). Thus, Petitioners' argument must fail.

Finally, Petitioners appear to contend that the International Union, as well as Local 912, breached Article XXIV, Subdivision 11, Section (e) which provides the manner in which Local Unions may negotiate and ratify collective bargaining agreements. The International Union has no obligations to Petitioners under this provision and thus could not have breached it. This issue therefore is also without merit.[4]

Thus, as the District Court and the Sixth Circuit correctly found that the International Union did not breach its Constitution, this Court should not grant the Petition on this issue.

II. THERE ARE NO "IMPORTANT ISSUES OF THE RESPONSIBILITY OF THE INTERNATIONAL UNION" REQUIRING REVIEW BY THIS COURT.

A. At page 24 of their Petition, Petitioners vaguely assert that this case presents "important issues of the responsibility of an International Union." The short answer to this assertion is that the actual responsibilities of an International Union are those spelled out in its

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[4] On this point, it should briefly be noted that Petitioners are once again selective in their reading of the International Constitution. Petitioners assert that collective bargaining agreements must be voted on by the membership pursuant to Article XXIV, Subdivision 11, Section (e). However, as Petitioners fail to mention, Article XXIV, Subdivision 11, Section (e) in fact authorizes Locals to ratify collective bargaining agreements in a number of different ways, one of which is by vote of the membership. However, the provision also authorizes a Local Union's membership to elect a negotiating committee and authorize such committee to negotiate and ratify the collective bargaining agreement without subsequent ratification by the membership. That had long been the practice of Local 912 and, as recognized by both the District Court (A-155 - A-156), and the Sixth Circuit (A-24 - A-25), was the procedure utilized at all times material to this case.

Constitution. As demonstrated above, the International Union did not breach its Constitution here.

If Petitions are attempting to argue that an International Union is automatically responsible for the unilateral actions of its autonomous Local Unions, that question has previously been decided by this Court. In *Carbon Fuel Co. v. United Mine Workers of America*, 444 U.S. 212 (1979), this Court determined that the common law of agency applied to the question of the International Union's responsibility. In the absence of evidence that the International Union instigated, supported, ratified, or encouraged the Local's acitvity, the International was held not to be responsible for such activity. *Id.*, at 218. See also, *Shimman v. Frank*, 625 F.2d 80, 97-99 (6th Cir. 1980). Here, the Sixth Circuit applied this standard and determined that Petitioners had failed to present any evidence sufficient to establish International Union responsibility for the Local's actions. (A-23, at fn. 7). That conclusion is clearly correct and nowhere in their Petition do Petitioners advance adequate reasons for this Court to review either the standard applied by the Sixth Circuit or the conclusions reached upon application of that standard. Therefore, their Petition should be denied on this issue as well.

CONCLUSION

For the reasons stated above, this case presents no issues worthy of this Court's review. Accordingly, the petition for *certiorari* should be denied.

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QUESTIONS PRESENTED

Although the Petitioners state numerous pages of Questions Presented, the Respondents, Local 912, International Union of Operating Engineers, AFL-CIO ("Local 912 Respondents"), assert that the only questions as to Local 912 which are properly presented by the Petition for Certiorari are:

1. Whether the Court of Appeals properly ruled that Local 912 Respondents did not breach their duty of fair representation to the Petitioners.

2. Whether the Court of Appeals properly ruled that there was no breach of the Constitution of the International Union of Operating Engineers by Local 912 Respondents.

3. Whether the Court of Appeals properly ruled that there was no factual basis for Plaintiffs'/Petitioners' conspiracy claims.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1995

No. 95-841

ALBERT AKINS, *et al.*,

Petitioners,

v.

ZENECA, INC.; RHONE-POULENC, INC.; RHONE-POULENC BASIC CHEMICALS COMPANY; STAUFFER CHEMICAL COMPANY; INTERNATIONAL UNION OF OPERATING ENGINEERS, AFL-CIO; LOCAL 912, INTERNATIONAL UNION OF OPERATING ENGINEERS, AFL-CIO,

Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

---

BRIEF OF RESPONDENTS, LOCAL 912, INTERNATIONAL UNION OF OPERATING ENGINEERS, AFL-CIO, IN OPPOSITION

OPINIONS BELOW

The opinions below which Petitioners challenge are unpublished and are reproduced in the Appendix, the Decision of the United States Court of Appeals for the Sixth Circuit at A. 128 and the Decision of the United States District Court for the Middle District of Tennessee at A. 1.

JURISDICTION

Respondents admit Petitioners' allegation of jurisdiction but deny that this case presents any issue over which this Court should assert jurisdiction.

STATUTE INVOLVED

Petitioners' primary claim arises under Section 301 of the Labor-Management Relations Act, as amended, 29 U.S.C. § 185. Petitioners' other claims are based on common law theories under the laws of the State of Tennessee.

STATEMENT OF THE CASE

This Petition for Certiorari was filed by current and former employees of Respondent Rhone-Poulenc (hereinafter "R.P."), in a case growing out of the closing of their furnace plant worksite due to exhaustion of necessary local minerals (A. 134, Bench Ruling of 10/21/93). Defendant Stauffer formerly operated two separate production facilities in Mt. Pleasant, Tennessee, known as the organic plant and the furnace plant. (A. 33, Memorandum Opinion of 6/28/93). At all times material hereto, the certified collective bargaining representative for the employees of both plants was Local 912, International Union of Operating Engineers (hereinafter "Local 912"). (*Id.*).

Prior to 1982, there was a single collective bargaining agreement (CBA) for the organic and furnace plants. (*Id.*) During contract negotiations in 1982, Stauffer sought to separate the organic and furnace plants into two separate bargaining units, one for each plant. (A. 136, Bench Ruling of 10/21/93). The members of Local 912 in both plants, through the democratic processes of their Union organization, elected a Bargaining Committee and such Committee agreed to the division into two separate units. (A. 147-48, Bench Ruling of 10/21/93). This Bargaining Committee, representing both plants, was

granted the power to approve and ratify the proposed CBAs without referring the same for full membership vote. (*Id.*).

At the time the bargaining unit was divided, Stauffer and Local 912 entered into a Memorandum of Agreement, which has come to be known as the 9/13/82 Memorandum. (A. 137, Bench Ruling of 10/21/93). The 9/13/92 Memorandum was incorporated by reference into the 1982 CBAs for each plant. (*Id.*) It provided that in the event of a reduction in force at either facility, the employees of that facility had a one-time opportunity to exercise their seniority to displace less senior employees at the other facility ("bump"), under certain limited conditions. (A. 137-38, Bench Ruling of 10/21/93).

In 1985, Stauffer and Local 912 renewed the CBAs for the organic and furnace plants for a three year period. (A. 37, Memorandum Opinion of 6/28/93). Defendant ICI Americas (hereinafter "ICI"), purchased Stauffer in 1987 and continued to operate both the organic and furnace plants (*Id.*) ICI assumed the obligations under the 1985 CBAs for both facilities. (*Id.*). Later in 1987, ICI sold the furnace plant to Defendant/Respondent Rhone-Poulenc. (Hereinafter "R.P.") (*Id.*) In 1988, both ICI and R.P. entered into new, separate, CBAs with Local 912, each for a three year period. (A. 40, Memorandum Opinion of 6/28/92). Both of these agreements incorporated by reference the 9/13/82 Memorandum. (*Id.*)

In June of 1990, R.P. announced it intended to close the furnace plant. (A. 41, Memorandum Opinion of 6/28/93). Anticipating problems related to the loss of work and the 9/13/82 Memorandum, the chief officer for Local 912, Business Manager James Kincade, wrote the President of the International Union, General President Frank Hanley, explaining the dilemma of being caught in the middle between two groups of its own members in a

job loss situation. (A. 42, Memorandum Opinion of 6/28/93).

In his letter, Mr. Kincade described the 9/13/82 Memorandum, indicated that one of the plants was scheduled to close, and asked, if the employees at one of the plants proposed to do away with the Memorandum, which group of employees would be entitled to vote on such a proposal under the provisions of Article XXIV, Subdivision 11, Section (e) of the International Union Constitution.* (A. 236, Plaintiffs' Ex. No. 7). The question of approval by the membership under Article XXIV, Subdivision 11, Section (e), turned out to be moot as the 1991 Contract for ICI was negotiated under the proviso to that Article which allowed the membership to authorize the Negotiating Committee to approve the new CBA without submitting the same to vote of the membership. (A. 152, Bench Ruling of 10/21/93).

In seeking how legally and appropriately to resolve the issues among its members, Mr. Kincade also sought legal advice from Local 912's counsel which ultimately resulted in the filing of a Declaratory Judgment action by the Union on 10/16/90. (A. 43, Memorandum Opinion of 6/28/93). That action sought to obtain a Court

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* Article XXIV, Subdivision 11, Section (3) provides, in pertinent part:

> Proposed collective bargaining agreements and modifications thereof may be negotiated for Local Unions by the Business Manager, by a committee, by the Local Executive Board, or by the Business Representative. Such agreements and modifications thereof shall not be executed until they have been presented at the next membership meeting following the negotiation of the proposed agreement and have been approved by the membership affected, *provided, however, that a Local Union may delegate to its Local Executive Board or to its bargaining committee authority to approve such agreements and modifications without such submission of the same to vote of its membership.* (Emphasis added to Proviso.)

Ruling on rights, obligations and duties of all parties where each plant included the 9/13/82 Memorandum in their CBA. While the parties to this action were engaging in written discovery and scheduling discovery depositions, on June 11, 1991, ICI and the elected Negotiations Committee for Local 912 entered into a new CBA which deleted all references to the 9/13/82 Memorandum. (A. 44, Memorandum Opinion of 6/28/93). This CBA resolved the issues concerning the 9/13/82 Memorandum and Local 912 dismissed the Declaratory Judgment action as moot. (A. 45, Memorandum Opinion of 6/28/93).

Two of the Petitioners, Terrance Nevette and Waylon Carroll, transmitted by facsimile a letter with exhibits to the International Union's President expressing their concern about the situation. (A. 45-6, Memorandum Opinion of 6/28/93). The General President forwarded the letter to Mr. Kincade requesting a reply. By letter dated 7/16/91, Kincade sent a four-page response to Hanley explaining the dilemma in which Local 912 found itself. (A. 278, Kincade letter to Hanley). That letter fully explained the actions taken by Local 912 and the reasoning behind the same, explaining:

> . . . I have sought guidance from your office and IOUE's Legal Department as well as Local 912's attorney. Any route 912 goes there is disagreement. It's just a question of whose ox is getting gored.
>
> (A. 285, 7/16/91 Kincade Letter to Hanley).
>
> . . . .
>
> Local 912's position has not changed. Local 912 knows what the intent and objective of the 1982 Memorandum was. It is the changing of time and events that has caused the problem of gaining the objective of bumping under the 1982 Memorandum . . .
>
> Our members who are disgruntled who work at Rhone-Poulenc think that Local 912 can just wave

> a magic wand and effect the bump, regardless of all that has transpired . . .
>
> Local 912 intends to do the best it can with the situation. If you have any suggestions as to how to equitably resolve the dilemma, please advise.
>
> (A. 288-9, 7/16/91 Kincade Letter to Hanley).

In November, 1991, sixty-eight employees of R.P. filed suit against the Defendants/Respondents alleging violations of § 301 of the Labor Management Relations Act, 19 U.S.C. § 185; § 101 of the Labor-Management Reporting and Disclosure Act, 29 U.S.C. § 411. In their lawsuit, the Plaintiffs also brought pendant state law tort claims based on tortious interference with contract and conspiracy. The United States District Court for the Middle District of Tennessee dismissed all of the Plaintiffs' claims following the Defendants' Motions for Summary Judgment (A. 115, Order of 6/28/93) and Motions for a Directed Verdict (A. 128, Bench Ruling of 10/21/93).

On the hybrid Section 301/DFR claim against R.P. and Local 912, the Court dismissed the full claim under the Doctrine of Impossibility (A. 145, Bench Ruling of 10/21/93). On the claim against Local 912 of Breach of the DFR by allowing ICI to negotiate the 9/13/82 Memorandum out of its CBA, the Court determined that there was no evidence of hostile or discriminatory action, bad faith or arbitrary or irrational conduct on the part of Local 912. (A. 149-150, Bench Ruling of 10/21/93.) The Court further determined that no violation occurred as the Bargaining Committee was properly authorized to negotiate and approve the CBA without a membership vote. (A. 148, 152, Bench Ruling of 10/21/93.) The District Court also dismissed the Constitutional claim against Local 912 arising under Article XXIV, Subdivision 11(e), determining that the language of the proviso of that Section was properly followed. (A. 154-5, Bench

Ruling of 10/21/93.) The State claims were dismissed before trial. (A. 115, Order of 6/28/93).

The Sixth Circuit Court of Appeals affirmed all decisions of the District Court. (A. 1, Sixth Circuit Decision of 7/27/95). The Sixth Circuit reversed on the finding of Impossibility but reached the same affirmance of dismissal of the Section 301/DFR claim by determining that Local 912 did not breach the DFR. It further affirmed that Local 912 had not breached the provisions of the Union Constitution nor violated State law.

REASONS FOR DENYING THE WRIT

Petitioners have failed to establish a case which satisfies any of the prerequisites for the granting of a Writ of Certiorari. Rule 10 of the Rules of this Court indicates that such Petitions will be granted only for special and important reasons, including when a Decision by the Court of Appeals is in conflict with the decision of a State Court of last resort or of another Court of Appeals on the same matter and when the lower Court has so far departed from the accepted and usual course of judicial proceedings or has sanctioned such departure, that an exercise of the Supreme Court's power is necessary. The Petition for Certiorari in this case fails to satisfy these or any other ground for granting a Petition and should be denied.

Before addressing the specific reasons Petitioner states for granting this Petition, it should be noted that Petitioners base much of their argument on an initial and interim decision of the District Court (A. 31, Memorandum Decision of 6/28/93). That Memorandum dismissed some portion of Plaintiffs'/Petitioners' Complaint and left the remainder to be determined at trial. When trial was held, at the close of Plaintiffs'/Petitioners' proof, upon Motion of Defendants/Respondents, the Court reconsidered its previous Ruling and made fact determinations based upon the presentation of Plaintiffs' complete case

(A. 28, Bench Ruling of 10/21/93). This final decision contradicted some statements in the previous Order, resolved all issues left open by the previous Order and was the determinative Ruling in this case. Therefore, Petitioners' references to the 6/28/93 Memorandum (A. 28) do not accurately reflect the findings of fact or decisions of law ultimately made at the District Court level. Proper reference to the final decision of the District Court should be made to the 10/21/93 Bench Ruling (A. 128) and its resolution of factual and legal issues.

I. THE DECISION BY THE SIXTH CIRCUIT COURT OF APPEALS DOES NOT CONFLICT WITH A DECISION OF ANOTHER COURT OF APPEALS OR A STATE COURT OF LAST RESORT.

A. Duty of Fair Representation Claim.

The Petitioners fail to show that the decision in this case conflicts with a decision of any other Court. Petitioners allege a conflict by claiming that the Sixth Circuit failed to address all parts of the legal standard governing the Duty of Fair Representation (DFR) and by relying upon two new cases with wholly different factual settings. Neither argument establishes a conflict.

The District Court decision began by stating the nature of a hybrid § 301/DFR case, explaining that a Plaintiff must prove both a breach of the Duty of Fair Representation (DFR) by the Labor organization and a breach of the terms of a collective bargaining agreement (CBA) by the Company in order to prevail against either party. *Vaca v. Sipes*, 386 U.S. 171, 87 S.Ct. 903, 17 L.Ed.2d 842 (1967). The District Court resolved the hybrid claim by holding that no breach of the CBA occurred. The District Court then applied the full DFR test to Plaintiffs'/Petitioners' other DFR claims against Local 912. The factual determinations flowing from this application were one basis of the Sixth Circuit's decision. An analysis of the three-part DFR Standard will clarify this issue.

In 1967, this Court decided *Vaca v. Sipes*, 386 U.S. 171, 17 L.Ed.2d 842, 87 S.Ct. 903 (1967) holding that there is no breach of the duty of Fair Representation unless a union's conduct toward its member is arbitrary, discriminatory or in bad faith. The Supreme Court reaffirmed this principal in *Motor Coach Employees v. Lockridge*, 403 U.S. 274, 299, 29 L.Ed.2d 473, 91 S.Ct. 1909 (1971) in which it held, "there must be substantial evidence of fraud, deceitful action, or dishonest conduct." That Court defined arbitrary, discriminatory or in bad faith as follows, "the doctrine . . . carries with it [in order to prove a breach of duty] the need to adduce *substantial evidence of discrimination that is intentional, severe, and unrelated to legitimate union objectives.*" 403 U.S. at 301. (Emphasis added.)

In *Balowski v. Int. U., United A., A. & A. Int. Wkrs.*, 372 F.2d 829, 834 (6th Cir. 1967) the Sixth Circuit held that a union's failure or refusal to accomplish a demand by a member in the processing of his grievance without additional findings of impropriety is insufficient to establish a breach of the duty, noting the requirements that:

> In particular, plaintiffs must make a showing that the action or inaction of the statutory representative complained of was motivated by bad faith, *for the gravamen of the rule is 'hostile discrimination.'* (Emphasis added.)
>
> 372 F.2d at 835.

Along the same lines, *see generally McKinney v. International Ass'n. of Machinists*, 624 F.2d 745, 749 (6th Cir. 1980) [arbitrary, discriminatory or bad faith action or some other animus-related conduct]; *Whitten v. Anchor Motor Freight, Inc.*, 521 F.2d 1335, 1341 (6th Cir. 1975), cert. den., 425 U.S. 981 (1976) [an affirmative showing that the union's inaction was motivated by bad faith is required]; and, *Dill v. Greyhound*

Corp., 425 F.2d 231, 238 (6th Cir. 1970), [hostility, malice or bad faith].

In *Air Line Pilots Assoc. v. O'Neill*, 499 U.S. ——, 113 L.Ed.2d 51, 58, 111 S.Ct. 1127 (1991), the Supreme Court clarified the standard in DFR cases, holding:

> We further hold that a union's actions are arbitrary only if, in light of the factual and legal landscape at the time of the union's action, the union's behavior is so far outside a wide range of reasonableness, *Ford Motor Co. v. Huffman*, 345 U.S. 340, 348 (1953), as to be irrational.

The Sixth Circuit has adopted this test in *Walk v. P*I*E* Nationwide, Inc.*, 958 F.2d 1323, 1326 (6th Cir. 1992), which holds:

> The Court's holding in *O'Neill* reflects that a deferential standard is employed as to a union's actions. They may be challenged only if 'wholly irrational.' *Id.* at 1136. In carrying out its duty of fair representation, an unwise or even unconsidered decision by the union is not necessarily an irrational decision.

Petitioners first aver that the Sixth Circuit erred by addressing only the arbitrary conduct portion of the standard governing the DFR. What Petitioners fail to state is that the District Court had already applied the other two prongs, discrimination and bad faith, and made a factual determination based upon Plaintiffs' presentation of their full case that Plaintiffs/Petitioners failed to show a breach of these two prongs of the DFR Standard. The District Court fully applied the arbitrary, discriminatory or bad faith standard. In applying the discrimination and bad faith parts of the standard, the District Court found:

> In this case the Court has viewed the evidence according to the standard that is applicable and has determined that under the three-part test there is no evidence of any hostile or discriminatory action on the part of the union. These questions were put to the witnesses and they disavowed that there was any

> hostility or discrimination in the sense that those terms are commonly understood in this area. There was no suggestion that the members of the furnace plant unit were being punished or discriminated against because of any positions that they had taken, or any operation or effect of internal union politics. The Court has also viewed the evidence under the applicable standard and is satisfied that there is no proof as would be required of a bad faith motive; that is, the union has a duty of acting in good faith. There is no evidence in this record of any bad faith motive.
>
> (A. 140, Bench Ruling of 10/21/93).

Having accepted the finding of the District Court that no arbitrary or discriminatory action on the part of Local 912 occurred, the Sixth Circuit addressed the remaining prong of the Standard, arbitrariness. It cited *Vaca v. Sipes*, supra, p. 10, and *Airline Pilots Ass'n., Int'l v. O'Neill*, supra, p. 11, both of which correctly articulate the standard which is accepted by all other Courts of Appeals. The Sixth Circuit determined that Local 912's actions were not arbitrary. (A. 15, Sixth Circuit Decision of 7/27/95). Therefore, the Sixth Circuit did not depart from the accepted and usual course of judicial proceedings nor did it render a decision in conflict with that of another Court of Appeals.

Petitioners allege a conflict between the Sixth Circuit's decision and the recent cases *Lewis v. Tuscan Dairy Farms, Inc.*, 25 F.3d 1138 (2d Cir. 1994) and *Aquinaga v. United Food & Comm. Workers Int'l. Union*, 993 F.2d 1463 (10th Cir. 1993), cert. den., 114 Sup. Ct. 880 (1994). Neither of these cases represent a conflict with the decision in the present case as both apply the very same law and legal standard. Any difference in results between those two cases and the present case is based upon factual differences among the cases.

In *Aquinaga* the Court made specific findings that the Union's activity was both irrational and in bad faith.

Further, the Court credited the plaintiffs' evidence that the Union intentionally sacrificed plaintiffs' rights and concealed the same due to its motivation to benefit itself in another bargaining relationship. (*Aquinaga, supra*, at 1471). Likewise, the Court in *Lewis* specifically found that a secret agreement existed between the company and union representatives and that the same was willfully concealed from union members. (*Lewis, supra*, at 1142-3).

The present decision in the Sixth Circuit simply does not conflict with the decision of another Court of Appeals. In this case, Local 912 was held not to be liable because it did not engage in arbitrary, discriminatory or bad faith conduct. The identical standard was applied in *Lewis*, and *Aquinaga*; however, factual differences in those cases led the Court to determine that violation of this Standard had ocurred. Because there is no conflict of law, there is no basis for the granting of Certiorari.

Lastly, Petitioners seek to rely upon a claimed conflict between the present decision and a case which was applied below, *Steele v. L&N Railroad Co.*, 323 U.S. 192, 89 L.Ed. 173, 65 S. Ct. 226 (1944). *Steele* adds nothing new to this Petition, nor does it establish any conflict among the Circuits. Petitioners merely use this case to re-argue their claims of "hostility and disloyalty" upon which claims the District Court and the Sixth Circuit have already rendered their decisions in accordance with the Standards applicable across the Federal Court system. Therefore, the Petition for Certiorari in this case should be denied.

B. Constitutional Claim.

Petitioners have also alleged that the Sixth Circuit decision is contrary to *Wooddell v. International Bhd. of Elec. Workers*, 502 U.S. ——, 116 L.Ed.2d 419, 112 S. Ct. 494 (1991). *Wooddell* establishes that a union constitution is a contract and may serve as the basis for a Section 301 suit by the member against his/her union. The Sixth Circuit decision does not conflict with this holding

as it expressly recognizes such cause of action. Here, the Sixth Circuit merely determined that the express and unambiguous wording of the constitution was properly followed by Local 912. Petitioners claim that Local 912 violated Article XXIV(11)(e), which states:

> Proposed collective bargaining agreements and modifications thereof may be negotiated for Local Unions by the Business Manager, by a committee, by the Local Executive Board, or by the Business Representative. Such agreements and modifications thereof shall not be executed until they have been presented at the next membership meeting following the negotiation of the proposed agreement and have been approved by the membership affected, *provided, however, that a Local Union may delegate to its Local Executive Board or to its bargaining committee authority to approve such agreements and modifications without such submission of the same to vote of its membership.* (Emphasis added.)

Regarding this claim, the District Court held:

> . . . this provision of Article XXIV, Subdivision 11, Section (e), was explicitly carried out in regular fashion and is reflected in the testimony in this case. The membership of the designated bargaining unit elected its own negotiating committee, instructed that negotiating committee with regard to the demands to submit in negotiations with the company and also expressly authorized that bargaining committee to approve such agreements without submission of the same to the vote of its membership.
>
> The Court holds that there was complete compliance with the provisions of the International Constitution . . . The contract was approved by a duly constituted bargaining committee, those members of the unit who were affected by it, and the Court determines as a matter of law that this claim should be dismissed.
>
> (A. 155-6, Bench Ruling of 10/21/93).

Plaintiffs' § 301 constitutional complaint was properly dismissed by the Court based on the very wording of the Constitutional clause. The Sixth Circuit affirmed the District Court's Decision, agreeing that the wording of the constitution was clear and was appropriately applied by Local 912. (A. 24-5, Sixth Circuit Decision of 7/27/95). The Decision of the Sixth Circuit does not conflict with any other Court's Decision nor does it depart from accepted and usual judicial proceedings. Therefore, the Petition should be denied.

II. OTHER ISSUES RAISED.

Without specifying a grounds for the granting of their Petition, Petitioners allege that the Sixth Circuit Decision usurped the province of the jury as to several claims, including state law claims. Though this allegation wholly fails to satisfy any of the categories stated for the acceptance of a Petition for Certiorari, Local 912 will briefly respond to show that the Sixth Circuit cited the proper Standard of Review, and followed the same. The Sixth Circuit reviewed the Grant of Summary Judgment *De Novo*, accorded to the Plaintiffs/Petitioners the most favorable reading of the evidence and determined that judgment as a matter of law was appropriate. (A. 9-10, Sixth Circuit Decision of 7/27/95)

Petitioners raise this argument regarding the state law claim of conspiracy, one of the claims dismissed prior to trial by the District Court. The Sixth Circuit properly determined that Plaintiffs had failed to establish by any evidence the necessary elements of conspiracy. The central failure of Plaintiff's conspiracy claim was its inability to establish the requisite underlying tort, here alleged to be tortious interference with contract. The Sixth Circuit held, in accordance with ample Tennessee precedent, that Local 912 could not have tortiously interfered with a contract to which it was a party. *Kochler v. Cummings*, 380 F.Supp. 1294, 1313 (M.D. Tenn. 1971). There is no dispute within the Courts of Tennessee regarding this

issue nor does the decision of the Sixth Circuit conflict with the Tennessee Decisions. Therefore, the Petition for Certiorari on this matter should also be denied.

CONCLUSION

Petitioners have failed to meet any of the necessary requirements for acceptance of a Petition for Certiorari. On the issues raised, breach of the Duty of Fair Representation, constitutional claim and state law claims, Petitioners have failed to show that there is any conflict among the Circuits or between this Circuit and the Tennessee Supreme Court. The Sixth Circuit has not departed from the accepted and usual course of judicial proceedings and there is no special or important reason for the Supreme Court to grant Certiorari in this case. Respondent Local 912 respectfully requests that the Petition for a Writ of Certiorari be denied.

Respectfully submitted,

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Supreme Court, U.S.
FILED
JAN 29 1996
CLERK

No. 95-841

IN THE
Supreme Court of the United States
OCTOBER TERM, 1995

ALBERT AKINS, *et al.*,
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v.

ZENECA INC.; RHONE-POULENC, INC.;
RHONE-POULENC BASIC CHEMICALS COMPANY;
STAUFFER CHEMICAL COMPANY;
INTERNATIONAL UNION OF OPERATING
ENGINEERS, AFL-CIO; LOCAL 912,
INTERNATIONAL UNION OF OPERATING
ENGINEERS, AFL-CIO,
Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

---

BRIEF OF RESPONDENT ZENECA INC. IN OPPOSITION

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QUESTIONS PRESENTED

Petitioners present a four-page list of argumentative "Questions Presented," which presumes facts that simply are not in the record. Notwithstanding petitioners' assertions, the only questions presented as to respondent Zeneca Inc. (formerly known as ICI Americas Inc. ("ICIA")) are:

1. Whether the Court of Appeals properly affirmed summary judgment in favor of ICIA on petitioners' claim under Section 301 of the Labor Management Relations Act, as amended, 29 U.S.C. § 185, because ICIA did not breach any contractual obligations to petitioners.

2. Whether the Court of Appeals properly affirmed summary judgment in favor of ICIA on petitioners' state law claims for tortious interference with contract and conspiracy.

RULE 29.6 CORPORATE AFFILIATION STATEMENT

Respondent Zeneca Inc. is ultimately owned 100% by Zeneca Group PLC, a publicly-owned company incorporated under the laws of England. Zeneca Group PLC owns 100% of the common stock of Zeneca Limited, a company incorporated under the laws of England. Zeneca Limited owns 100% of the common stock of Zeneca Investments Limited, a company incorporated under the laws of England. Zeneca Investments Limited owns 100% of the common stock of Zeneca Holdings Inc., a Delaware corporation. Zeneca Holdings Inc. owns 100% of the common stock of Zeneca Inc., a Delaware corporation, with its principal place of business at Wilmington, Delaware 19897.

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ENGINEERS, AFL-CIO; LOCAL 912,
INTERNATIONAL UNION OF OPERATING
ENGINEERS, AFL-CIO,
Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

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BRIEF OF RESPONDENT ZENECA INC. IN OPPOSITION

Respondent, Zeneca Inc. (formerly known as ICI Americas Inc., and hereafter referred to as "ICIA"),[1] respectfully requests that this Honorable Court deny the petition for writ of certiorari which seeks review of the Sixth Circuit Court of Appeals' decision below.

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[1] ICI Americas Inc. changed its name to Zeneca Inc. effective December 27, 1992 (R. 167). Because the Company's name was ICI Americas Inc. at the time of the relevant events, and at the time this lawsuit was filed, the name "ICIA" will be used in this brief.

STATUTE INVOLVED

29 U.S.C. § 185(a) provides:

> Suits for violation of contracts between an employer and a labor organization representing employees in an industry affecting commerce as defined in this chapter, or between any such labor organizations, may be brought in any district court of the United States having jurisdiction of the parties, without respect to the amount in controversy or without regard to the citizenship of the parties.

STATEMENT OF THE CASE

While petitioners' statement broadly captures the pertinent chronology, the statement contains inaccuracies and omissions of key facts. Contrary to the petition's suggestion (p. 3), the parties to the 1982 collective bargaining agreements ("CBAs") for Stauffer's furnace plant and organic plant were Local 912 and Stauffer, not petitioners and Stauffer. For every CBA since 1974, the Local 912 negotiating committee for each plant has had advance authorization from the bargaining unit employees to accept a new CBA without approval or ratification by the employees. (R. 136 at 130-31, 145-46, 163, 469).

Contrary to the petition (p. 3), there is no evidence that it was a "condition" of either 1982 Stauffer CBA, or of the September 13, 1982 Memorandum of Agreement, (also referred to as the "cross-bumping agreement"), that any employee would "retain" a "transfer right" to the other plant. Rather, as the Court of Appeals noted, each CBA provided only that the cross-bumping agreement "shall be considered as supplemental to the [CBA] between the parties . . . and shall remain in full force and effect during the period of such [CBA] unless modified by the parties in writing." (A-4). Each CBA remained in effect for three years.

Petitioners omit any reference to the undisputed evidence on summary judgment [2] confirming that the cross-bumping memorandum was simply "part and parcel" of each CBA that included it. The memorandum did not stand on its own. (R. 136 at 74-75, 135-36, 157-58, 320-21, 470-71, 509, 533; R. 162, ¶ 22). Thus, petitioners fail to mention that the 1985 CBAs for each of two Stauffer plants again simply provided that the cross-bumping memorandum was supplemental to the CBAs and that it would remain in effect only for the three-year duration of each CBA. (A-4).

Likewise, after the two plants were under separate ownership,[3] ICIA's 1988 CBA for the organic plant again merely provided that the cross-bumping document was supplemental to the June 11, 1988 - June 11, 1991 CBA, and that it would remain in effect for that three-year period. (A-5; R. 162, ¶ 56; R. 136 at 361-62). ICIA's June 11, 1991 organic plant CBA, which deleted all references to the 1982 cross-bumping memorandum, provided that it "shall supersede and cancel the previous agreement between the parties." (R. 162, ¶¶ 74, 76-77; R. 136 at 272-73, 371-74).

Nothing in the cross-bumping memorandum said that it must be included in any future CBA, that it had any

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[2] Because the District Court granted summary judgment to ICIA on all claims, the only relevant record as to ICIA is that which was before the district court on summary judgment. *Lippi v. City Bank*, 955 F.2d 599, 604 (9th Cir. 1992); *Nissho-Iwai American Corp. v. Kline*, 845 F.2d 1300, 1307 (5th Cir. 1988); *Voutour v. Vitale*, 761 F.2d 812, 817 (1st Cir. 1985), *cert. denied*, 474 U.S. 1100 (1986).

[3] The petition incorrectly states that ICIA purchased the furnace and organic plants in 1987, and then sold the furnace plant to Rhone-Poulenc. The accurate fact, as noted by the Court of Appeals, is that various corporate affiliates of Imperial Chemical Industries, P.L.C. purchased the entity owning the two plants. One of the affiliates retained the organic plant and merged it into ICIA. Another affiliate operated the furnace plant for a short time before Rhone-Poulenc acquired it.

greater duration than the CBA of which it was a part, or that the document was to have any force or effect if it was not included in subsequent CBAs. Similarly, the 1988-1991 CBA for ICIA's organic plant did not state that the memorandum would have any greater duration than that three-year CBA, or that it had to be included in any later CBA. (A-18 n.6).

Petitioners' suggestion (petition, pp. 7-8) that ICIA did something less than vigorously defend against Local 912's declaratory judgment action is nonsense, and contrary to the undisputed evidence. (R. 136 at 588-90). ICIA deposed Rhone-Poulenc's plant manager, and all parties engaged in extensive written discovery. When, on advice of counsel, Local 912 dismissed the action as moot due to the deletion of the cross-bumping memorandum from ICIA's CBA, eighteen days still remained before the discovery cutoff date. Dispositive motions were not due for a month and a half. (R. 162, ¶¶ 67, 81).

The fact that ICIA had not filed a dispositive motion before completion of discovery, and a month and a half before it was due, is not evidence of something other than standard litigation practice. Likewise, there is not an iota of evidence that ICIA or Rhone-Poulenc "waited" to do anything, or that some nefarious "agreement was apparently reached between ICI and the Union." (Petition, pp. 8, 10 n.4).[4]

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[4] The meritless nature of petitioners' claims is confirmed by petitioners' reliance on a letter from ICIA's counsel (not from "ICI" as petitioners suggest in a misleading fashion) in which an effort was made to resolve the declaratory judgment action six months before ICIA's new organic plant CBA rendered the action moot. (Petition, pp. 8-10). A party's inquiry regarding potential resolution of a lawsuit hardly is evidence of a secret conspiracy, especially when the same party also vigorously litigates the matter.

Finally, petitioners state in a misleading fashion that "[n]o member from the bargaining unit at the furnace plant was permitted to participate in the negotiations relating to the organic plant." (Petition, p. 11). The undisputed evidence is that petitioners made no effort to participate in ICIA's organic plant negotiations, although no one told petitioners that they could not participate. (R. 136 at 166, 170-71, 525-27, 559-60).

REASONS FOR DENYING THE WRIT

The Court of Appeals correctly affirmed summary judgment in favor of ICIA. The petition fails to implicate any of the special and important reasons for granting a petition for a writ of certiorari as set forth in Supreme Court Rule 10.1. Instead, petitioners simply assume without evidentiary basis that they had vested rights against ICIA, and argue that the Court of Appeals was wrong because it did not agree with petitioners' contention.

I. THE COURT OF APPEALS CORRECTLY HELD THAT PETITIONERS HAD NO VESTED RIGHT TO JOBS AT ICIA'S PLANT. ANY RIGHT OF PETITIONERS TO DEMAND JOBS AT THE PLANT CEASED WHEN ICIA'S COLLECTIVE BARGAINING AGREEMENT DELETED THE CROSS-BUMPING AGREEMENT.

The Court of Appeals correctly rejected petitioners' claim that they had a vested right to employment at ICIA's plant. As the court noted, nothing in the cross-bumping agreement or any extrinsic evidence indicates that any right to transfer to the organic plant was intended to be vested. Nor was the nature of petitioners' claimed right within the special class of entitlements that an employee works to accumulate over time, such as retirement benefits. Accordingly, any claim to employment at ICIA's plant ended when the Company and Local 912 reached a new CBA which deleted the cross-bumping

memorandum. (A-16 - A-20). Notably, petitioners do not even argue that the Court of Appeals erred in this regard.

Instead, petitioners' contentions regarding ICIA are that "an employer may not claim the benefit of a contract which the Union is not authorized to make" (petition, p. 20), and that ICIA "should not be permitted to retain the benefits received from inducing the Union to breach its contractual and trust obligations to Petitioners." (*Id.*, p. 22). Both arguments are specious, since they assume facts that are not present in the record.

There is no evidence that the Union lacked authorization to enter into a CBA with ICIA for its organic plant, or that ICIA induced the Union to do anything. As the Court of Appeals held, the Union Constitution permitted the membership of each bargaining unit to elect its own negotiating committee, with authority to approve CBAs for their particular plant. (A-24 - A-25). It is undisputed that since 1974 every Local 912 negotiating committee, including the 1991 organic plant committee, had advance authorization to enter into a CBA without ratification by bargaining unit employees. It is similarly undisputed that ICIA and the negotiating committee arrived at a CBA on June 11, 1991 after bargaining over its terms. Accordingly, petitioners' reliance on *Steele v. L. & N. R.R.*, 323 U.S. 192 (1944), and *Brotherhood of Locomotive Firemen v. Mitchell*, 190 F.2d 308 (5th Cir. 1951), is inappropriate.[5]

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[5] Even assuming that Local 912 had no authority to enter into the June 11, 1991 organic plant CBA, which is not the case, ICIA still would be entitled to enforce the CBA. The Union had apparent authority to enter into the CBA, and ICIA could reasonably believe that the Union possessed that authority. *See Kozera v. Westchester-Fairfield Chapter of Nat'l Elec. Contractors Ass'n*, 909 F.2d 48, 54 (2d Cir. 1990), *cert. denied*, 498 U.S. 1084 (1991) (agreement was binding even though it had not been ratified by membership, and union violated duty of fair representation and disclosure, where employer could reasonably believe that union had authority to bind union membership); *NLRB v. Truckdrivers Local Union No. 100*, 532 F.2d 569, 571 (6th Cir.), *cert. denied*, 429 U.S. 869 (1976)

Finally, no matter how petitioners characterize their argument, they are making an inappropriate attack on the validity of ICIA's June 11, 1991 CBA. The Court of Appeals noted that this challenge was not properly before the court, because it lacked jurisdiction under § 301 to decide the validity of CBAs. (A-17 n. 5 (citing *Adcox v. Teledyne, Inc.*, 21 F.3d 1381, 1386 (6th Cir.), *cert. denied*, —— U.S. ——, 115 S. Ct. 193 (1994)).

Any claim petitioners may once have had to potential employment at ICIA's organic plant ended with ICIA's June 11, 1991 CBA. Accordingly, the Court of Appeals properly affirmed summary judgment in favor of ICIA on the § 301 claim.

II. THE COURT OF APPEALS PROPERLY AFFIRMED SUMMARY JUDGMENT IN FAVOR OF ICIA ON PETITIONERS' STATE LAW CLAIMS.

There can be no conspiracy claim absent a "combination between two or more persons to accomplish by concert an unlawful purpose or to accomplish a purpose, not in itself unlawful, by unlawful means." *Hardin v. Caldwell*, 695 S.W.2d 189, 191 (Tenn. Ct. App. 1985), *later proceeding*, 60 B.R. 214 (E.D. Tenn.), *later proceeding*, 67 B.R. 296 (E.D. Tenn. 1986), *later proceeding*, 851 F.2d 852 (6th Cir. 1988). For two independent reasons, the Court of Appeals correctly affirmed summary judgment in favor of ICIA on petitioners' state law claims for conspiracy and tortious interference with contract.

(while a Union's membership may require ratification by the membership, an employer may rely upon the apparent authority of the Union representatives to conclude an agreement, where there is a basis for such reliance) (citing *International Union of Elevator Constructors, Local No. 8*, 185 N.L.R.B. 769 (1970), *enforced*, 465 F.2d 974 (9th Cir. 1972)); and *Moreau v. Local Union No. 247, Int'l Bhd. Of Firemen*, 851 F.2d 516, 520 (1st Cir. 1988) (an agreement entered into by a union representative with apparent authority to bind the union is valid and binding even if actual authority, such as through membership ratification, is lacking).

First, petitioners presented no evidence that ICIA combined with anyone to do anything. The record contains no evidence remotely supporting petitioners' fanciful suggestions about what the respondents "must have" thought or done. (Petition, p. 21).

Second, both the conspiracy and tortious interference with contract claims fail because there is no evidence supporting the tortious interference claim. *See Forrester v. Stockstill*, 869 S.W.2d 328, 330 (Tenn. 1994) (no conspiracy claim absent proof of the underlying tort claim). Malice is an essential element of a tortious interference claim in Tennessee. *Testerman v. Tragesser*, 789 S.W.2d 553, 556-57 (Tenn. Ct. App. 1989). Petitioners presented no evidence that ICIA acted with malice at any time. To the contrary, ICIA was completely justified in entering into a new CBA containing no reference to the cross-bumping document, thus ending any argument as to ICIA about the document. *See Polk & Sullivan, Inc. v. United Cities Gas Co.*, 783 S.W.2d 538, 543 (Tenn. 1989) (justification exists when "defendant has acted merely in the due exercise of his own right to carry on his business himself.").

Petitioners' state law claims are without merit. As with petitioners' federal claims, nothing warrants review by this Court.

CONCLUSION

The petition for certiorari should be denied.

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Supreme Court, U.S.
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NO. 95-841

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1995

ALBERT AKINS, ET AL.,
PETITIONERS

v.

ZENECA, INC.,; RHONE-POULENC, INC.; RHONE-POULENC BASIC CHEMICALS COMPANY; STAUFFER CHEMICAL COMPANY; INTERNATIONAL UNION OF OPERATING ENGINEERS, AFL-CIO; LOCAL 912 INTERNATIONAL UNION OF OPERATING ENGINEERS, AFL-CIO,
RESPONDENTS

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

PETITIONERS' REPLY BRIEF TO RESPONDENTS' BRIEFS IN OPPOSITION

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PETITIONERS' REPLY BRIEF TO RESPONDENTS' BRIEFS IN OPPOSITION

Petitioners submit the following reply to the briefs in opposition filed by Respondents.

1. **RHONE-POULENC, INC. AND RHONE POULENC BASIC CHEMICALS COMPANY.**

(a) Rhone-Poulenc incorrectly indicates in its question No. 1 (p. i of Rhone-Poulenc's brief) that the Court of Appeals ruled that the International Union did not breach its duty of fair representation to the Petitioners. In fact, the Court of Appeals held that the International Union had no duty of fair representation to Petitioners (contested by Petitioners) and specifically stated that "Local 912, not IUOE, is the exclusive bargaining representative of Plaintiffs and, therefore, Local 912 alone owes Plaintiffs a duty of fair representation". (App. 27, 28.)

(b) Rhone-Poulenc, in its opposition brief (p. 4), further states that the District Court concluded that under the § 301 hybrid claim against Rhone-Poulenc and the Union, Petitioners had failed to prove that there was both a breach of duty of fair representation by the Union and a breach of contract by the employer. This statement by Rhone-Poulenc is untrue. In fact, what the District Court held was that Rhone-Poulenc did not violate the contract because of the impossibility doctrine and accordingly, dismissed the § 301 hybrid claim against Rhone-Poulenc and the Union on that ground alone. The Court specifically stated that "there is no need for the Court to reach the question of whether there was a breach of fair representation". (App. 145, 146.)

After dismissing the § 301 hybrid claim, the District Court went on to discuss (App. 146-153) the "next claim", which

was an independent claim against Local Union 912 alone based on the deletion of the Cross Bumping Agreement from the ICI contract. This separate claim was not part of the § 301 hybrid claim against Rhone-Poulenc. (See n. 3 to Court of Appeals decision [App. 16] and n. 5 to the petition for certiorari [Pet. 18; see also, App. 145-153].)[1]

The Court of Appeals rejected the impossibility defense relied upon by the District Court but dismissed the § 301 hybrid cause of action against Rhone-Poulenc and the Unions solely on the claimed basis that Local 912 did not violate its duty of fair representation by failing to pursue a

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[1] In ruling on the summary judgment motions, the District Court clearly pointed out the distinction between the § 301 hybrid action against Rhone-Poulenc and the separate § 301 claim against Local 912. (See n. 19 at App. 90, 91; see also, App. 58-61, 82-94.) The District Court held evidence sufficient to prevent summary judgment had been presented to show that Rhone-Poulenc had breached its contract and Local 912 had breached its duty of fair representation by failing to process the grievance against Rhone-Poulenc. See also, App. 60, 293-295, 306, 307, 322-325.

grievance on behalf of Petitioners. (App. 13-16.) The Court of Appeals also drew a clear distinction between the § 301 hybrid action against Rhone-Poulenc and the separate fair representation claim against Local 912 alone. (n. 3 at App. 16; see also n. 5, p. 18 of petition for certiorari.)

(c) Rhone-Poulenc's dispute of Petitioners' reliance on Rhone-Poulenc's internal memorandum of 9/13/88 (p. 2 of Rhone-Poulenc's brief) is without merit. That memorandum was filed as Plaintiffs' exhibit No. 4 and was part of the record considered by the Court on the motions for summary judgment.

Furthermore, in the pre-trial order, the authenticity of that document was stipulated. (App. 211.) At the trial, the same document was offered as trial exhibit No. P-10 and excluded on the basis that a

witness with personal knowledge of the exhibit must testify to the exhibit.[2]

(d) Rhone-Poulenc erroneously indicates that Petitioners, rather than Respondents, have characterized the declaratory judgment action as a "friendly lawsuit" (p. 2 of Rhone-Poulenc's brief). As confirmed by the correspondence from the Union's attorney to each corporate respondent (App. 255-259), the Respondents had discussed, prior to suit, that the Union considered the declaratory judgment action a "friendly lawsuit". Moreover, ICI's letter of December 12, 1990 (App. 260-272), in relation to the

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[2]The document, on its face, contains relevant statements and identifies the author. Furthermore, the witness specifically identified the author and his relationship to Rhone-Poulenc and further testified to the negotiation proceedings contemplated by the proffered exhibit. (TR. 562, 577, 578, 628-634, 563-567.) To require a witness with specific personal knowledge of the document to testify as a condition of admissibility after authenticity has been stipulated, makes the stipulation meaningless. Rules 402 and 901 of the Federal Rules of Evidence; ;McCormick on Evidence (3rd ed. 1984) § 227, p. 698); 7 Wigmore, Evidence §§ 2128(3), 2130-2132. (After authentication, "counsel" may read or submit document to jury.)

declaratory judgment action, lends even greater support to the conspiracy claim.

2. ICI (ZENECA, INC.)

ICI argues that it should be able to retain the benefits it secured from inducing the Union to breach its trust and contractual obligations to Petitioners. To support its position, ICI is reduced to arguing that its letter of December 12, 1990 (App. 260-272), was a letter from ICI's attorney rather than from ICI. The letter clearly reflects that it is the considered actions of ICI. ICI's argument is factually incorrect[3] and contrary to the holdings in Steele v. L & N Railroad Company, 323 U.S. 192, 202, 203, 207, 65 S.Ct. 226, 232-234, 89 L.Ed. 173 (1944); Brotherhood of Locomotive

[3]ICI also argues (brief, p. 5) that it was misleading for Petitioners to state that "[n]o member from the bargaining unit at the furnace plant was permitted to participate in the negotiations relating to the organic plant". However, those quoted words are from paragraph No. 17 of the complaint (R. 1), which was admitted by Local 912 in its answer. (R. 23.)

Firemen, etc. v. Mitchell, 190 F.2d 308, 312, 313 (5th Cir. 1951).

3. **INTERNATIONAL UNION OF OPERATING ENGINEERS, AFL-CIO.**

Contrary to the argument[4] of the International Union, Petitioners specifically stated, in the pre-trial order, they were claiming that "the International Union breached its contractual obligations to Plaintiffs under Section VI(2)(3) and (5) and XXIV(11)(e) of the IUOE Constitution". (App. 179, 180, 547, 208-211.) In addition to the proof on all of the designated constitutional sections, Petitioners' attorney, during the trial, specifically argued to the Court the express wording of Article VI(5). (App. 416, 417.)

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[4]The International Union erroneously continues to rely upon agency defenses and decisions that pre-date Wooddell v. International Bd. of Elec. Workers, 502 U.S. ____, 112 S.Ct. 494, 116 L.Ed.2d 419 (1991). (See also, Pet. 22-25.) The Union's waiver defenses are also without merit. (See Pet., p. 23, n. 8 and p. 18, n. 5.)

4. LOCAL 912, INTERNATIONAL UNION OF OPERATING ENGINEERS, AFL-CIO.

The Local Union's claim that the ICI negotiating committee had authority to accept the 1991 ICI contract on behalf of Petitioners, is not only factually incorrect, but is also contrary to the admissions made by Local Union 912 in its answer.[5] The record contains voluminous factual testimony (ignored by Respondents)[6] that Petitioners never

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[5] Paragraph No. 17 of the complaint (R. 1), as admitted by Local Union 912 (R. 23) , stated as follows:

> 17. No member of the bargaining unit at the phosphate plant was permitted to participate in the negotiations relating to the organic plant. No member of the bargaining unit from the phosphate plant ever agreed to or authorized the deletion of the September 13, 1982, agreement. The June, 1991 agreement between ICI Americas Inc. and Local Union No. 912 was never authorized or approved by, nor submitted to, the bargaining unit for the phosphate plant.

[6] Mr. Carroll testified (App. 296, 297) as follows:

> Q And what did Mr. Kincade continue to tell you?
>
> A He kept telling us that they could not affect us. If they voted it out of their contract, they could not vote ours away.

...

Q Mr. Carroll, if you had known ultimately, looking back, if you had known that the ICI employees deleting that from the contract, deleting the cross bumping portion from your contract would have affected your rights what would you have done?

A The first thing that we would have done was wanted a committee, our committee in on those meetings, and to represent our behalf. And if they had ever tried to vote it out, they couldn't because we had 250 members. They had a hundred twenty-five. It just wouldn't have come out of there.

Q The ICI contract of 1991, was that ever submitted to you or the employees at Rhone-Poulenc for approval?

A No, ma'am.

Mr. Paley also testified at the trial as follows:

Q. Did any member of the bargaining unit for the furnace plant ever approve or authorize any changes in the cross bumping agreement when it was dropped from the organic plant contract?

A. No, sir. We had no say in that whatsoever.

Q. All right. Did any member from the furnace plant have any say in the selecting of the negotiating committee?

authorized the Union or anyone else to surrender their rights and that in fact, the Union continually falsely represented to Petitioners that their rights would not be affected.

Respectfully submitted,

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A. No, sir. Nor the proposals of the negotiating committee.

Q. You just had nothing to do with it at all, is that right?

A. Nothing whatsoever.

Q. No member of your bargaining unit at the furnace plant?

A. No, sir. (Tr. 571, 572.)